(9)

No. 96-1060-CFX
Status: GRANTED

Title: Lorelyn Penero Miller, Petitioner
v.
Madeleine K. Albright, Secretary of State

Docketed:
January 6, 1997

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Patterson,Donald Ross

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 6 1997	G	Petition for writ of certiorari filed. (Response due March 7, 1997)
3	Jan 28 1997		Order extending time to file response to petition until March 7, 1997.
4	Mar 6 1997		Brief of respondent Madeleine K. Albright, Secretary of State in opposition filed.
5	Mar 19 1997		DISTRIBUTED. April 11, 1997 (Page 1)
7	Apr 14 1997		REDISTRIBUTED. April 18, 1997 (Page 13)
9	Apr 21 1997		REDISTRIBUTED. April 23, 1997 (Page 10)
10	Apr 28 1997		Petition GRANTED. SET FOR ARGUMENT November 4, 1997. **********
11	May 12 1997		The order granting the petition for a writ of certiorari is amended to read: The petition for a writ of certiorari is granted limited to the following question: Is the distinction in 8 U.S.C. Sec. 1409 between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment to the United States Constitution?
12	Jun 12 1997		Joint appendix filed.
13	Jun 12 1997		Brief of petitioner Lorelyn Penero Miller filed.
14	Jun 12 1997		Brief amici curiae of American Civil Liberties Union and NOW Legal Defense Fund filed.
16	Jul 15 1997		Order extending time to file brief of respondent on the merits until July 25, 1997.
17	Jul 25 1997		Brief of respondent Madeleine K. Albright, Secretary of State filed.
18	Aug 25 1997	G	Application (A97-154) to extend the time to file a reply brief from August 28, 1997 to September 19, 1997 by petitioner, submitted to The Chief Justice.
19	Aug 25 1997		Application (A97-154) granted by the Chief Justice extending the time to file until September 19, 1997.
20	Sep 16 1997		CIRCULATED.
21	Sep 19 1997		Reply brief of petitioner Lorelynn Penero Miller filed.
22	Sep 26 1997	*	Record filed. Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.
23	Oct 23 1997	*	Record filed. Original record proceedings United States District Court for the District of Columbia Circuit.
24	Nov 4 1997		ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

WARREN CHRISTOPHER, Secretary of State of The United States,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the distinction in 8 U.S.C. Section 1409(a) between "legitimate" and "illegitimate" children an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Is the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Is 8 U.S.C. Section 1409 an unconstitutional taking away of citizenship previously conferred by 8 U.S.C. Section 1401(g)?

4. Is 8 U.S.C. Section 1409 unconstitutional under the rational basis test?

5. Does the Voluntary Paternity Decree which legitimizes the Plaintiff effective as of the date of her birth, effectively legitimized Plaintiff prior to her eighteenth birthday?

PARTIES TO THE PROCEEDINGS

PETITIONER:

Lorelyn Penero Miller

RESPONDENT:

Warren Christopher, Secretary of State

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PETITION FOR WRIT OF CERTIORARI

Lorelyn Penero Miller hereby petitions for a writ of certiorari and requests that this Court grant the petition, issue a writ of certiorari, reverse in part the judgment of the District of Columbia Circuit of the Court of Appeals and remand with instructions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reproduced at Appendix A at 1 [hereinafter App.]. The Memorandum Opinion and Order, April 29, 1994, Royce C. Lamberth, United States District Judge, Civil Action No. 93-1182, U.S. District Court, District of Columbia is reproduced at Appendix B, App. at 26. The decision of Thomas W. Callow, acting Director, Office of Citizen Consular Services, dated, November 5, 1992, is found in Appendix C, App. at 32.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was pursuant to 5 U.S.C. Section 704 and 28 U.S.C. Section 1331. The jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. Section 1291 (Final Decisions of District Courts). The appeal was filed June 15, 1994 from

a Memorandum Opinion and Order, entered on April 29, 1994, dismissing the case.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition concerns the due process clause of the fifth amendment with its guarantee of equal protection under the law.

8 U.S.C. Section 1401. Nationals and citizens of the United States at birth.

> "The following shall be nationals and citizens of the United States at birth: . . .
>
> (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in Section 1 of the International Organization Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or

> (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical-presence requirement of the paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and . . . "

8 U.S.C. Section 1409. Children born out of wedlock

> "(a) The provisions of paragraphs (c), (d), (e), and (g) of Section 301 [8 USCS section 1401(c)-(e), (g)], and of paragraph (2) of Section 308 [8 USCS Section 1408(2)], shall apply as of the date of birth to a person born out of wedlock if –
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years –
>
> (A) the person is legitimated under law of the person's residence domicile,
>
> (B) the father acknowledges paternity the person in writing under oath, or

(C) the paternity of the person established by adjudication of competent court.

(b) Except as otherwise provided in section 405 [8 USCS Section 1101 note], the provisions of section 301(g) [8 USCS Section 1401(g)] shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years of legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

STATEMENT OF THE CASE

A. Factual Background

The Plaintiff, Lorelyn Penero Miller, was born on June 20, 1970 in Angeles City, Republic of the Philippines, the daughter of Luz Penero, a Philippine citizen, and Charlie R. Miller, an American serviceman. The Plaintiff's parents were not married at the time of her birth, nor did they subsequently marry. Her father, Charlie R. Miller, was a U.S. serviceman who left the Philippines upon the

conclusion of his tour of duty. On July 27, 1992, the 321st Judicial District Court of Smith County, Texas signed a Voluntary Paternity Decree declaring, at the request of Charlie R. Miller, that the Plaintiff was his biological and legal child. The decree legitimizes Lorelyn at birth.

In November 1991, Plaintiff, Lorelyn Penero Miller, duly applied to Defendant for registration as a United States Citizen and for issuance of a passport pursuant to 22 U.S.C. Section 221A and 22 C.F.R. Sections 5.13 and 5.120. The application was denied in a letter dated March 23, 1992. A copy of the Voluntary Paternity Decree and other information was provided to the Defendant and reconsideration of the application by the Defendant was requested. In a letter dated August 11, 1992, from Richard Roseman, Chief Passport and Citizenship Unit, United States Embassy, Manila it was stated:

"Thank you for your letter of July 30, 1992 regarding the registration as a U.S. Citizen of Lorelyn Penero Miller.

We are forwarding a copy to the State Department of the petition decree which legitimizes Lorelyn, and we are asking that this case be reconsidered. Although the final determination will be made in Washington, in our opinion the petition decree legitimizes Lorelyn at birth. Should the Department agree with us, we will be most pleased to register her as a U.S. Citizen and issue her a U.S. Passport.

We will contact Lorelyn directly as soon as a decision is reached in this matter." (Appendix D, App. at 36)

In a subsequent letter dated August 28, 1992, Mr. Roseman informed the Plaintiff, Lorelyn Penero Miller, that her application for registration as U.S. citizen had been denied for the stated reason that her legitimation had not occurred prior to her eighteenth birthday. In a notice dated November 5, 1992, Plaintiff was informed that Thomas W. Callow, Acting Director, Office of Citizens Counselor Services, had upheld the decision denying recognition as a U.S. Citizen and denying an passport to the Plaintiff, (Appendix C, App. at 32). The Plaintiff then filed this suit in the Eastern District of Texas on January 22, 1993. The Plaintiff's father, Charlie R. Miller, was dismissed as a Plaintiff and the case was transferred to the United States District Court for the District of Columbia by an order signed on the 2nd day of June, 1993.

B. Proceedings Before the District Court

In a Memorandum Opinion and Order (Appendix B, App. at 26) filed April 29, 1994, the case was dismissed by Judge Royce C. Lamberth, United States District Judge for the District of Columbia, on the basis that Ms. Miller lacked standing.

C. Proceedings Before The Court of Appeals

The Plaintiff appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals held

> "that Ms. Miller had standing to bring this action; but in light of controlling Supreme Court precedent, we conclude that the challenged statute [8 U.S.C. § 1409] is Constitutional."

The Court of Appeals believed that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) foreclosed it from holding 8 U.S.C. Section 1409 unconstitutional.

Judge Wald wrote a separate opinion in which she "regretfully" concurred in the judgment against Ms. Miller. She concluded:

> "*Fiallo* is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S. Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court." (Appendix A, App. at 25).

SUMMARY OF ARGUMENT

The Plaintiff seeks a finding that she was a U.S. Citizen by birth. Using the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. Citizen mothers and U.S. Citizen fathers as a means to take this citizenship away from her is unconstitutional.

The Texas Court legitimized the Plaintiff effective as of the date of her birth. Therefore, she was effectively legitimized prior to her eighteenth birthday.

REASONS FOR GRANTING THE PETITION

I

The distinction in 8 U.S.C. Section 1409(a) between "legitimate" and "illegitimate" children is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to the federal government through the Fifth Amendment's Due Process Clause.

The District Court did not reach the issue of constitutionality of 8 U.S.C. Section 1409(a). The Court of Appeals felt that *Fiallo v. Bell*, 430 U.S. 787 (1977) was controlling. But see *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (DNJ 1991), where a well reasoned opinion, which analyzes *Fiallo v. Bell*, the Court finds the statute in question, INA Section 309 (8 U.S.C. Section 1409), is unconstitutional because of its requirement that a foreign born child of a U.S. citizen be formally legitimated by the age of twenty-one. The Court stated:

> "The discrimination in § 309 between persons on the basis of 'illegitimacy' is an archaic reminder of past discriminatory treatment of individuals in society, both in terms of the stigma attached to 'illegitimate' with which it branded the children of unwed parents, and in terms of the sex discrimination that was reflected in the law that a man could 'legitimate'

> a child whereas a woman could not. In addition to inhumane and unfair in this way, a distinction on the bases of 'legitimacy' is also an impractical distinction in today's society where unwed mothers abound, and single parenthood has become norm . . .
>
> Accordingly, the Court concludes that the distinction in the Act between the 'legitimate' and 'illegitimate' children is an unconstitutional violation of the equal protection clause . . . " *LeBrun* at 1213

It appears that the opinion of the District Court was so well reasoned that the Government did not see fit to take an appeal to the Circuit Court.

In *LeBrun*, the Court also states that the statute conditions the retention of citizenship upon an official act by the father of illegitimate children. Courts have long recognized that the rights of one cannot be made contingent upon the rights of another and an individual keeps his citizenship unless "he voluntary relinquishes it". *LeBrun* at 1221.

In *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) the Supreme Court invalidated the Texas Statute which withheld from local school districts any state funds for the education of children who were not legally admitted into the United States and which authorized local school districts to deny enrollment to such children. The Court held that the statute violated the equal protection clause of the Fourteenth Amendment, stating the children who were the Plaintiff's in the case before it "can effect neither their parents conduct nor their own status". The Court held that to punish children

for the conduct of their parents "does not conform with fundamental concepts of justice". The Court went on to cite its ruling in *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406-07, 37 L.Ed.2d 768 (1972):

> " . . . visiting condemnation on the head of an infant is illogical and injust, moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that the legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent."

In *LeBrun v. Thornburgh*, at 1212, the Court says:

> "It is wrong for a father to have the unilateral ability to confer or deny citizenship to his daughter."

Mr. Miller does not wish to deny citizenship to his daughter. Under Texas law she will inherit his property as his daughter. 8 U.S.C. Section 1409(a)(4), as interpreted by the Defendant, violates the Equal Protection Clause.

In *Trimble v. Gordon*, 430 U.S. 762, 772, 97 S.Ct. 1459, 1466, 52 L.Ed.2d 31 (1977) the Court established a standard for examining statutes that distinguish between "legitimates" and "illegitimates" under which the question is whether the statute "is carefully tuned to alternative consideration". The Court took into account "the lurking problems with respect to the proof of paternity" but noted that while these problems "are not to be lightly brushed aside, . . . neither can they be made into an impenetrable barrier that works to shield, otherwise,

insidious discrimination", 430 U.S. at 771 97 S.Ct. at 1466. In *LeBrun v. Thornburgh* at 1211, it is stated:

> "The Court concludes that Section 309 is not 'carefully attuned to alternative consideration'. Even under a minimum rational standard, the distinction made in Section 309 of the statute must fail. Moreover, under the standard articulated in *Rogers v. Bellei*, the distinction is not only unreasonable and arbitrary but it is also, under the equal protection clause, unlawful." The Department of Justice did not appeal.

The Court of Appeals felt it was controlled by *Fiallo v. Bell*, 430 U.S. 787, 52 L.Ed.2d 50, but the 9th Circuit correctly points out in *Wauchope v. U.S. Department of State*, 985 F.2d 1407 (9th Cir., 1993):

> "Unlike the Government decision at issue in *Fiallo* and *Mandel*, Section 1993 represents not a congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance. This type of decision strikes us as fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such as that we should utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it."

While this references another Section, the reasoning applies with equal vigor to 8 U.S.C. Section 1409.

If *Fiallo* is assumed to be directly on point,

> . . . I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official

> action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S. Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court (Appendix A, App. at 25).

II

The distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. Citizen fathers is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as applied to the federal government through the Fifth Amendments Due Process Clause.

> As a practical matter, there is no distinction between the rights under the Act of the legitimate and illegitimate children of American women born outside the United States and its possessions. In each instance, only the fact of the mother's U.S. citizenship at the time of the child's birth need be established. Therefore, the issue before us is whether the additional requirements imposed by section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent. We find the Supreme Court's decision in *Fiallo* to be dispositive on both counts (Appendix A, App. at 10).

Judge Wald, in her concurring opinion concludes:

> . . . I think it is important to underscore the extent to which *Fiallo* is out of step with the

> Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalization" about men and women. *Virginia*, 116 S. Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Appendix A, App. at 25).

However, *Fiallo v. Bell* dealt with a congressional determination that various aliens should or should not be treated in a certain manner. This case, like *Wauchope v. U.S. Department of State*, the decision at issue is who is a citizen in the first instance.

> This type of decision strikes us as fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such as that we should utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it."

The Court of Appeals erred in finding *Fiallo v. Bell* was controlling since it deals with the treatment of aliens. This case is one involving citizenship.

III

8 U.S.C. Section 1409 is an unconstitutional taking away of citizenship having previously been conferred by 8 U.S.C. Section 1401(g).

Plaintiff was conferred citizenship by 8 U.S.C. Section 1401(g).

8 U.S.C. Section 1401(g) grants nationality and citizenship to a person born outside the geographical limits of the United States and its outlying possessions and one

of whom's parents is a U.S. citizen who resided in the United States prior to the person's birth.

Plaintiff meets the requirements of this Section in that she was born in the Philippines and her father, Charlie R. Miller, satisfies the parental requirement. 8 U.S.C. Section 1409, "Children born out of wedlock", takes away the grant of citizenship conferred by 8 U.S.C. Section 1401(g) unless certain things have occurred during the minority of the child: a) the person is legitimate under the law of the person's residence or domicile; b) the father acknowledges paternity of the person in writing under oath; or c) the paternity of the person is established by adjudication of a competent court. Language of 8 U.S.C. Section 1401(g) is a blanket grant of citizenship to a group which includes the Plaintiff. Then we have a later attempt in 8 U.S.C. Section 1409 to take away or limit that blanket grant and take it away from the Plaintiff because the Plaintiff is illegitimate.

8 U.S.C. Section 1409 is an unconstitutional violation of the Equal Protection Clause because it applies only when the American citizen parent is a man – the father. It doesn't apply to situations where the American citizen parent is a woman – the mother. Moreover, it requires that the acts of legitimation or "adjudication" be undertaken and completed during the minority of the child. There are two forms of constitutionally impermissible discrimination in 8 U.S.C. Section 1409 – discrimination against illegitimate children as a class as well as gender based discrimination.

In the context of this Federal Nationality Statute, the Due Process Clause of the Fifth Amendment has been

found to provide equal treatment co-extensive with that of the Equal Protection Clause. See *Boiling v. Sharpe*, 347 U.S. 497 (1954).

In defending 8 U.S.C. Section 1409, the Defendant has stated:

> "The Government also has an obvious interest in insuring that there is, in fact, a blood relationship between the child seeking American citizenship and the American citizen. Maternity is rarely a factual issue, whereas paternity is frequently placed at issue in human experience. The possibility for fraud in connection with citizenship is therefore more likely and more difficult to prove or disprove." (Page 9 of Memorandum of Point and Authorities in Support of Defendant's Motion to Dismiss.)

In her concurring opinion in the Court of Appeals, Judge Wald states:

> "Unlike the majority, I see no rational basis for a law that requires a U.S. citizen father, but not a U.S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship. Rather, I believe that this requirement is based simply on the stereotyping assumption that a mother will be closer to her child born out of wedlock than a father will be to his. Unfortunately, however, I also believe that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), forecloses us from holding that the imposition of such requirements on U.S. citizen fathers but not on U.S. citizen

mothers is unconstitutional, and thus I regretfully concur in the judgment against Ms. Miller. (Concurring Opinion, P.1)" (Appendix A, App. at 15)

Judge wald concludes:

> "Notably, and regrettably, *Fiallo* treated the fear of legislating on the basis of stereotypes with a somewhat cavalier disdain, remarking in a footnote that any complaints that statutory distinctions between the illegitimate children of mothers and fathers and their illegitimate children are "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children" were more appropriately addressed to Congress. Id. at 799 n.9.
>
> Fiallo is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes of "overbroad generalizations" about men and women. *Virginia* 116 S. Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court." (Appendix A, App. at 24)

In *Albang v. Reno,* 52 F.3d 801 (9th Cir. 1995), the Court upheld a provision of the Nationality Act of 1940, 54 Stat. 1137, concerning illegitimate children, citing in support of its decision a note from *Fiallo v. Bell*:

> "The inherent difficulty of determining the paternity if a illegitimate child is compounded when it depends upon events that may have occurred many years earlier."

The question can be asked: Do these difficulties change at a given age as to the father, but not as to the mother?

> "Before the advent of reliable genetic testing, this requirement of legitimation may well have been a reasonable method for preventing fraud, as false fathers would be more likely to claim paternity once a child had reached majority and no financial responsibility to the child remained. In the absence of "clear and convincing" evidence of the blood tie, such as genetic testing, this legitimation requirement might well have been a useful proxy."

But Congress itself has acknowledged that genetic testing is extremely reliable. In the Child Support Enforcement Amendments of 1984, Congress required states, as a condition of receiving federal funds, to eliminate laws establishing statutes of limitation on proof of paternity:

> Relatively short statutes of limitation were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress is developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the

> child. *These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child* and therefore the obligation to support that child.

H. REP. No. 627, 98th Cong., 1st Sess. 38 (1983) (emphasis added). Since Congress itself has acknowledged that the accuracy of genetic testing has "elimiated the rationale" for time limits on the establishment of paternity, the fear of fraud cannot be a facially legitimate and *bona fide* reason for requiring fathers – and only fathers – to take special actions to legitimate and agree to support their child by a certain date." (Appendix A, App. at 18)

The Government acknowledges that 8 U.S.C. Section 1409 makes distinctions in the ability to transmit citizenship based on gender. In *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (DNJ 1991) discussed above, Judge Sarokin found that:

> "The Court concludes that the applicable law discriminates against 'illegitimate' children and thereby violates the equal protection clause of the United States constitution. The law as it then existed and as applies in this matter serviced to make the citizenship of children born out of wedlock to American fathers, particularly those serving in the armed forces, subject to the personal vagaries and consciences of their fathers. Those who choose to act with honor could confer such citizenship, and those who chose not to, could deny citizenship to their offspring. Even the dilatory father, as in this same case, could defeat the child's claim to citizenship merely by

> delaying the recognition of his responsibility, until it was to late to satisfy the residency requirements.
>
> Those who have no choice in the marital status of their parents should not be so penalized or stigmatized, and their rights to citizenship should not be dependent on the moral fortitude (or lack thereof) of one of their parents. The unfairness is exacerbated by placing such power solely in the hands of the male parent. The law was thus discriminatory in its impact upon children born out of wedlock and sexist in making citizenship dependent upon the acquiescence of the male parent only." *LeBrun v. Thornburgh*, F. Supp. at 1206.

In addition to *LeBrun v. Thornburgh*, the United States 9th Circuit Court of Appeals, declared unconstitutional a nationality law which also drew unlawful distinctions among transmitting citizenship on the basis of gender.

In a *Wauchope v. Department of State*, 985 F.2d 1407 (1993) hereinafter cited as *Wauchope*, Section 1993 of the Revised Statutes of 1874, allowing American citizen males but not American citizen females, the right to pass on their citizenship to foreign born offspring, the Court found that this statute's impermissible gender based discrimination was constitutionally infirmed as a violation of the equal protection component of the 5th Amendment's due process clause. See also *Elias v. Department of State*, 721 F. Supp. 243 (ND. Cal 1981), where, just as in the later *Wauchope*, the District Court found unlawful gender-based discrimination. The Justice Department abandoned the appeal of *Elias v. Department of State*.

IV

8 U.S.C. Section 1409 is unconstitutional under the rational basis test.

Illegitimate children are not recognized as a suspect class and therefore the strict scrutiny standard of equal protection analysis does not apply.

In *Wauchope* the 9th Circuit applied the rational basis test to determine whether there was a factually legitimate and *bona fide* reason for the discrimination. The Government cites *Fiallo v. Bell*, 430 U.S. 787 (1977) as a proposed factually legitimate and *bona fide* reason for the gender discrimination contained in 8 U.S.C. Section 1409. *Fiallo v. Bell* may be distinguished on the basis that it represented a challenge to the legal immigration system over which, it has long been conceded, Congress has almost plenary power. See *Runnett v. Schultz*, 901 F.2d 782, 787 (9th Cir. 1990). In the instant case, 8 U.S.C. Section 1401(g) actually conferred citizenship on the daughter, subject to the conditions subsequent of legitimation prior to her eighteenth birthday found in 8 U.S.C. Section 1409. The fathers' attempt in *Fiallo v. Bell* to provide immigration benefits for children who were indisputably aliens is clearly distinguishable.

The legislative history does not articulate any Congressional purpose for the "take away" provision in 8 U.S.C. Section 1409 directed against illegitimate children. The Government argues that the problem of proof should be recognized as a rational basis for the legitimation provisions of 8 U.S.C. Section 1409. The Government's proof rationale fails as either a factually legitimate or *bona fide* reason to justify the unequal treatment. The proof of

fatherhood proposal, if recognized, would be constitutionally infirmed as underinclusive as to a Plaintiff who was recognized as being the illegitimate daughter and, in fact, has been legitimated under the laws of the State of Texas. The Court in *Wauchope* noted that:

> " . . . Courts 'need not, in equal protection cases except at face value assertions of legislative purposes, when . . . the asserted purpose could not have been the goal of legislation.' " *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) " '[W]e [must be] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained.' " *Christian Science Reading Room v. City and County of San Francisco*, 792 F.2d 124, 124 (9th Cir. 1986) quoting *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1097 (3rd Cir. 1981) cer. denied, 479 U.S. 1066 (1987) *Wauchope* 985 F.2d at 1415.

Therefore, consistent with the 9th Circuit's constitutional analysis in *Wauchope* there is no rational basis and no factually legitimate and *bona fide* reason that exists to justify the legitimation requirement of 8 U.S.C. Section 1409.

Judge Wald seems to agree, stating:

> "Once parentage has been definitively established, there is no reason to require fathers, but not mothers, to take the additional step of formal legitimation and a written agreement to provide financial support before a child's 18th birthday." (Appendix A, App. at 18)

V

The Voluntary Paternity Decree legitimizes the Plaintiff effective as of the date of birth. Therefore, she was effectively legitimized prior to her eighteenth birthday.

On July 27, 1992, the 321st Judicial District court of Smith County, Texas in Cause No. 92-1491-D, *In the Interest of Lorelyn Penero Miller,* AKA Lorena Penero Miller, entered a voluntary paternity decree (Appendix E, App. at 37) which legitimated the Plaintiff effective retroactivity to her date of birth. This fact has been recognized by employees of the Defendant (Appendix D, App. at 36 and Appendix C, App. at 33) and it complies with the requirements of 8 U.S.C. Section 1409(a)(4) which provides that while a person is under the age of eighteen years, or prior to the 1986 amendments, under the age of twenty-one years:

> "(A) the person is legitimated under the law of the person's residence or domicile (B) the father acknowledges the paternity of the person in writing under oath, or (C) the paternity of the person is established adjudication of a competent court."

The effect of the action above the Court was to establish the paternity of the Plaintiff while she was under the age of eighteen years since it established her paternity at the time of her birth.

Thus it is not necessary for the Court to declare 8 U.S.C. Section 1409 unconstitutional but only to interpret its provisions as they were interpreted by the Passport and Citizenship Unit of the American Embassy, Manila,

Philippines in their letter dated August 11, 1992 (Appendix D, App. at 37).

CONCLUSION

The Petitioner respectfully requests the Court to Grant her petition, issue a writ of certiorari, reverse in part the judgment of the District of Columbia Circuit of the Court of Appeals and remand with instructions.

Respectfully submitted,

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APPENDIX

Appendix A Opinion of Court of Appeals for District of Columbia Circuit .....App. 1

Appendix B Memorandum Opinion and Order U.S. District Court .....App. 26

Appendix C Decision, Acting Director, Office of Citizen Consular Services.....App. 32

Appendix D Letter Chief Passport and Citizenship Unit, U.S. Embassy Manila.....App. 36

Appendix E Voluntary Paternity Decree .....App. 37

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 21, 1995 Decided October 8, 1996

No. 94-5160

LORELYN PEÑERO MILLER, APPELLANT

v.

WARREN CHRISTOPHER, SECRETARY OF STATE, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 93cv01182)

Donald R. Patterson argued the cause and filed the briefs for appellant.

John O. Birch, Assistant United States Attorney, with whom *Eric H. Holder, Jr.*, United States Attorney, and *R. Craig Lawrence*, Assistant United States Attorney, were on the brief, argued the cause, for appellee. *John D. Bates* and *Douglas A. Wickham*, Assistant United States Attorneys, entered appearances for appellee.

Before WALD and HENDERSON, *Circuit Judges*, and BUCKLEY,* *Senior Circuit Judge*.

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* At the time of oral argument, Judge Buckley was a circuit judge in active service. He assumed senior status on September 1, 1996.

Opinion for the court filed by *Senior Circuit Judge* BUCKLEY.

Separate opinion concurring in the judgment filed by *Circuit Judge* WALD.

BUCKLEY, *Senior Circuit Judge*: Lorelyn Peñero Miller, a nonresident alien, appeals the dismissal of her complaint for lack of Article III standing and challenges the constitutionality, on equal protection grounds, of a statute governing the citizenship of an illegitimate child born abroad of an American father and an alien mother. We hold that Ms. Miller had standing to bring this action; but in light of controlling Supreme Court precedent, we conclude that the challenged statute is constitutional.

I. BACKGROUND

Ms. Miller was born in Angeles City, Republic of the Philippines, on June 20, 1970. Her birth certificate states that Ms. Miller was illegitimate; and it identifies her mother as Luz Peñero, a Filipino national. It does not identify her father. Ms. Miller claims that she is the daughter of Charlie R. Miller, a U.S. citizen, who, at the time of her birth, was a member of the U.S. military stationed in the Philippines. Mr. Miller and Luz Peñero have never married.

In February 1992, eight months after Ms. Miller's 21st birthday, she applied to the U.S. State Department for registration as a United States citizen. In her complaint, Ms. Miller stated that she was "a . . . resident of the Angeles City, Republic of the Philippines." First

Amended Complaint at 1. The record does not reveal whether she has ever been to the United States.

In 1992, the State Department denied Ms. Miller's application for U.S. citizenship on the ground that she failed to meet the requirements of the provision of the Immigration and Naturalization Act of 1952 ("Act"), 8 U.S.C. § 1409(a), which applies to persons born out of wedlock outside the United States of an American father and an alien mother. As amended in 1988, section 1409(a) provides that such a child will be deemed a U.S. citizen as of the date of birth if:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years –
>
> > (A) the person is legitimated under the law of the person's residence or domicile,
> >
> > (B) the father acknowledges paternity of the person in writing under oath, or
> >
> > (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1994). Because she falls within a narrow statutory age bracket, Ms. Miller would be able to satisfy the requirement of section 1409(a)(4) on a showing

that she was legitimated prior to the age of 21, rather than 18, as provided under the section before it was amended in 1986. *See* 8 U.S.C. § 1409 note (Effective Date of 1986 Amendment). The State Department found that Ms. Miller failed to meet the requirements of subsections (3) and (4) of section 1409(a). *See Miller v. Christopher*, No. 93-1182 (D.D.C. Apr. 29, 1994) ("Mem. Op.") at 3.

On July 27, 1992, Mr. Miller obtained a Voluntary Paternity Decree from a Texas state court, establishing that he was Ms. Miller's biological father. Ms. Miller submitted that document to the State Department and requested reconsideration of its denial of her application. Ms. Miller then sought judicial review of her claim in the United States District Court for the Eastern District of Texas. In that action, she named the Secretary of State ("Secretary") as defendant. Ms. Miller's complaint charged that the statutory prerequisites to her application for U.S. citizenship contained in 8 U.S.C. § 1409(a) violated the Constitution's equal protection principles because of the statute's distinctions between legitimate and illegitimate children and between men and women. Complaint ¶ XII(1). Ms. Miller sought a declaration that she "is a citizen of the United States and is entitled to all the rights and privileges of citizens of the United States including a right to possess a passport." First Amended Complaint ¶ XVII(2).

The Secretary moved to dismiss the complaint or, in the alternative, to transfer venue. Thereupon, Ms. Miller amended the complaint, adding Mr. Miller, a resident of Texas, as co-plaintiff. On June 2, 1993, the district court in Texas dismissed Mr. Miller's claims for lack of standing and ordered that the case be transferred to the United

States District Court for the District of Columbia, where venue, based on the Secretary's residence, was proper. *Miller v. Christopher*, C.A. No. 6: 93 CV 39 (E.D. Tex. June 2, 1993). Upon transfer, the Secretary renewed his motion to dismiss. By Memorandum Opinion and Order dated April 29, 1994, the district court granted the Secretary's motion to dismiss on the basis that Ms. Miller lacked standing. Mem. Op. at 5.

Ms. Miller presents three core issues on appeal. She argues, first, that the district court erred in finding that she lacked standing; second, that section 1409(a) violates the Equal Protection Clause of the Fourteenth Amendment; and, finally, that, even if the court upholds the constitutionality of section 1409(a), she meets its requirements because the Texas state court paternity decree retroactively legitimated her as of the date of her birth.

We address these arguments in turn.

II. Discussion

A. Standing

Article III of the United States Constitution requires plaintiffs invoking federal jurisdiction to establish three elements of standing:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly

> trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks, citations, ellipses, and footnote omitted).

As the existence of the first two elements is conceded, the issue before us involves the third – whether Ms. Miller's injury is redressable by a favorable decision. Although the district court found that Ms. Miller may have suffered an injury that was caused by the conduct of the Secretary, it concluded that Ms. Miller did not have standing to bring this action. Specifically, the court held that she had failed to "demonstrate any redressable injury" because, under *INS v. Pangilinan*, 486 U.S. 875 (1988), federal courts do not have the power to "grant citizenship." Mem. Op. at 5 (citing *Pangilinan*, 486 U.S. at 884). The court reasoned that

> [e]ven if this court should conclude that 8 U.S.C. § 1409(a) is unconstitutional, this court could not grant citizenship to plaintiff [because, under *Pangilinan*,] this could only be accomplished by legislative action. Only Congress has the power to confer citizenship to persons not constitutionally entitled to citizenship.

Id.

We respectfully disagree. In determining whether an injury is redressable, a court must ask "whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted.*" *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989) (emphasis in original). Ms. Miller did not request the court to *grant* her citizenship; rather, she requested that the court declare section 1409(a) unconstitutional and merely make a *finding* under the general rule applicable to persons born outside of the United States, 8 U.S.C. § 1401(g), that she was a U.S. citizen from birth. Section 1401(g) provides, in pertinent part:

> The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years. . . .

8 U.S.C. § 1401(g) (1994).

We agree with Ms. Miller that, if the district court had held section 1409(a) to be unconstitutional, it could have found that she was a U.S. citizen pursuant to section 1401(g). Such a finding would not have violated *Pangilinan's* proscription on the exercise of judicial equitable power to confer U.S. citizenship in the absence of legislative authority. Consequently, we hold that Ms. Miller has standing to pursue her claim.

B. Constitutionality of Section 1409

Ms. Miller challenges section 1409(a) on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment, as applied to the federal government through the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Specifically, Ms. Miller claims that the statute denies equal protection by illegally distinguishing between: (a) legitimate versus illegitimate children, (b) the illegitimate children of men versus those of women, and (c) the rights of the father of an illegitimate child versus those of its mother. Ms. Miller's last claim is based upon Mr. Miller's rights as a parent. Because he is not a party to this appeal, however, the claim is not properly before the court. *See Ablang v. Reno*, 52 F.3d 801, 804 n.4 (9th Cir.1995) (holding that non-parties' claims could not be asserted by proxy through parties).

Before addressing the substance of Ms. Miller's claims, we must first determine the level of scrutiny we apply to the statute. The Supreme Court has recognized that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953). Acknowledging Congress's plenary authority to prescribe rules for the admission and exclusion of aliens, the Supreme Court has found it

> important to underscore the limited scope of judicial inquiry into immigration legislation. Th[e] Court has repeatedly emphasized that over no conceivable subject is the legislative

> power of Congress more complete than it is over the admission of aliens.

Fiallo v. Bell, 430 U.S. 787, 792 (1977) (internal quotation marks and citations omitted). In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court articulated a standard of review for First Amendment challenges in the immigration context. It held that the exercise of such power will be upheld if based on a "facially legitimate and bona fide reason." *Id.* at 770. Five years later, when faced with an equal protection challenge to an immigration statute's " 'double-barreled' discrimination based on sex and illegitimacy," *Fiallo*, 430 U.S. at 794, the Court found "no reason to review the broad Congressional policy choice at issue . . . under a more exacting standard than was applied in *Kleindienst*. . . . " *Id.* at 795. In determining whether a facially legitimate and bona fide reason supports a statute, we note that "Congress need not have stated its rationale for the distinction in the text or legislative history." *Ablang*, 52 F.3d at 805.

We now determine whether there is a facially legitimate and bona fide reason for the statute at issue here. Under the Immigration and Nationality Act, the burdens imposed upon illegitimate children are greater than those imposed upon legitimate children; and the burdens imposed upon the illegitimate children of American men are greater than those imposed upon the illegitimate children of American women. Specifically, under section 1401(g), *every legitimate* child born outside the United States "of parents one of whom is an alien, and the other a citizen of the United States" who meets certain residency requirements, is a citizen of the United States at birth. 8 U.S.C. § 1401(g). The provisions of that section,

however, do not apply to the illegitimate child born abroad of a United States citizen and an alien who fails to meet the requirements set forth in section 1409. Similarly, while an illegitimate child born outside the United States of an American mother need only establish that the mother was a citizen at the time of its birth and has met a minimal residency requirement, *see id.* § 1409(c), the illegitimate child of an American father must establish two additional facts: it must prove both a *biological* relationship with the father, *see id.* § 1409(a)(1), *and* the existence, prior to the child's eighteenth birthday, of a *personal* relationship between them as evidenced by (a) the father's written agreement to provide it with financial support until it reaches that age and (b) the father's voluntary acknowledgement of his paternity or a court adjudication confirming the fact, *see id.* §§ 1409(a)(3) & (4).

As a practical matter, there is no distinction between the rights under the Act of the legitimate and illegitimate children of American women born outside the United States and its possessions. In each instance, only the fact of the mother's U.S. citizenship at the time of the child's birth need be established. Therefore, the issue before us is whether the additional requirements imposed by section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent. We find the Supreme Court's decision in *Fiallo* to be dispositive on both counts.

That case involved a constitutional challenge to another section of the Act, 8 U.S.C. § 1101(b), which, like section 1409, draws distinctions among alien children on

the basis of legitimacy and the sex of their parents. In relevant part, the section reads as follows:

> The term "child" means an unmarried person under twenty-one years of age who is –
>
> (A) a legitimate child; [or]
>
> * * *
>
> (D) an illegitimate child . . . on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father *if the father has or had a bona fide parent-child relationship with the person.* . . .

8 U.S.C. §§ 1101(b)(1)(A) & (D) (emphasis added). Section 1101(b) also includes a legitimated child within the definition but only if "such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of legitimation," *id.* § 1101(b)(1)(C) – conditions that are comparable to those imposed by sections 1409(a)(3) and (4). As in this case, the appellants in *Fiallo* claimed that the statute "denied them equal protection by discriminating against natural fathers and their illegitimate children 'on the basis of the father's marital status, the illegitimacy of the child, and the sex of the parent without either compelling or rational justification.' " 430 U.S. at 791 (citation omitted).

The Court observed that in enacting section 1101(b),

> Congress was specifically concerned with the relationship between a child born out of wedlock and his or her natural mother, and the legislative history . . . reflects an intentional choice not to provide preferential immigration

> status by virtue of the relationship between an illegitimate child and his or her natural father.

Id. at 797. The Court acknowledged that the provisions of the section "ma[de] it more difficult for illegitimate children and their natural fathers to be reunited in this country than . . . for illegitimate children and their natural mothers." *Id.* at 798. It pointed out, however, that while these were admittedly the consequences of the congressional decision not to accord preferential status to this particular class of aliens, . . . the decision nonetheless remain[ed] one solely for the responsibility of the Congress and wholly outside the power of this Court to control. Congress obviously ha[d] determined that preferential status [was] not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk[ed] in paternity determinations. In any event, it [was] not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.

Id. at 798-99 (internal quotation marks, citations, and footnotes omitted). The Court then held that the challenged provisions "are not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his natural father from the preferences accorded by the Act" to others. *Id.* at 800.

While recent developments in DNA technology may have removed many of the difficulties that once plagued the proof of paternity, as required by section 1409(a)(1), in light of that holding and the Court's reference to "the

perceived absence of close family ties" between illegitimate children and their natural fathers as well as to the problems of proof in paternity determinations, we see no basis for concluding that section 1409(a) is unconstitutional. Rather, we conclude, as did the Ninth Circuit, that "a desire to promote early ties to this country and to those relatives who are citizens of this country is not a[n ir]rational basis for the requirements made by" sections 1409(a)(3) and (4). *Ablang*, 52 F.3d at 806. Furthermore, we find it entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father. A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence. As the Court has recognized, "mothers and fathers of illegitimate children are not similarly situated." *Parham v. Hughes*, 441 U.S. 347, 355 (1979). "The putative father often goes his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother." *Id.* at 355 n.7 (internal quotation marks and citation omitted). This sex-based distinction seems especially warranted where, as here, the applicant for citizenship was fathered by a U.S. serviceman while serving a tour of duty overseas. Counsel for Ms. Miller conceded, during oral argument, that Ms. Miller and her father had not had an ongoing parental relationship while she was a minor, although the two appear to have developed one since then. But even if Ms. Miller had argued, as did the appellants in *Fiallo*, that the requirements of section 1409(a) were "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children,"

Fiallo, 430 U.S. at 799 n.9, the Supreme Court specifically noted that "this argument should be addressed to the Congress rather than the courts." *Id.*

C. Application of Section 1409(a)

Ms. Miller contends that, even assuming the constitutionality of section 1409(a), the Texas state court's paternity decree applies retroactively to her birth, and that she therefore satisfies the requirement of section 1409(a). We are unpersuaded. Ms. Miller obtained the paternity decree after she turned 21; the statute, however, requires legitimation or establishment of paternity "*while* the person is under the age of" 18 or, as in her case, 21, depending on whether the previous or amended version of the statute applies. To allow Ms. Miller to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation. Because an applicant must satisfy each of the requirements of section 1409(a)(1)-(4), and Ms. Miller has failed to satisfy those of subsections (a)(3) and (4), the State Department properly denied her application for citizenship.

III. CONCLUSION

While the district court erred in holding that Ms. Miller lacked standing to bring her claim, we reject her constitutional challenges to section 1409(a) and find that she failed to meet its requirements. We therefore remand

the case to the district court for further proceedings consistent with this opinion.

So ordered.

WALD, *Circuit Judge, concurring in the judgment:* Charlie R. Miller obtained an order from a state court in Smith County, Texas on July 27, 1992, establishing paternity of his daughter, Lorelyn. If he had obtained the decree on June 19, 1991, the day before Lorelyn's 21st birthday, she would now be a citizen of the United States. But because of his delay of little more than a year and a month, she is not a citizen – though there is *no* question that Miller is her father.[1] Unlike the majority, I see no rational basis for

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[1] As the majority notes, Lorelyn Miller fell into a narrow statutory age bracket the members of which were allowed to elect to have the version of 8 U.S.C. § 1409(a) that was in force at the time of the 1986 amendments apply to their citizenship applications. *See* 8 U.S.C. § 1409 *note* (Effective Date of 1986 Amendment). This version of section 1409(a) provided that a child born out of wedlock to a U.S. citizen father was a U.S. citizen at birth if the father met certain residency requirements and "the paternity of such child is established while such child is under the age of twenty-one years by legitimation." *See* 8 U.S.C. § 1409(a) *note* (Amendments). The government does not appear to dispute the fact that Charlie Miller met the relevant residency requirements and thus, under the version of section 1409(a) applicable to her, Lorelyn Miller was only required to have established her paternity by legitimation the age of twenty-one in order to qualify for citizenship. Since the government also does not dispute that the Texas state court order constituted legitimation under the terms of this version of section 1409(a), I assume that this order would be sufficient to support Lorelyn Miller's claim for citizenship had she obtained it before she turned 21. I have couched the following discussion, however, in terms of the requirements contained in the current

a law that requires a U.S. citizen father, but not a U.S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship. Rather, I believe that this requirement is based simply on the stereotyping assumption that a mother will be closer to her child born out of wedlock than a father will be to his. Unfortunately, however, I also believe that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), forecloses us from holding that the imposition of such requirements on U.S. citizen fathers but not on U.S. citizen mothers is unconstitutional, and thus I regretfully concur in the judgment against Ms. Miller.

As the majority notes, under *Fiallo* we must uphold the requirement that a U.S. citizen father must legitimize and agree to provide financial support for his child before the age of majority to transmit citizenship, even though no parallel burden is placed on U.S. citizen mothers, if we find that there is a "facially legitimate and bona fide reason" to distinguish between U.S. citizens in this fashion. *Id.* at 795; *Kleindienst v. Mandel*, 408 U.S. 753, 770

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version of section 1409(a), which, as the majority describes, require the illegitimate child of a U.S. citizen father to "prove both a *biological* relationship with the father, and the existence, prior to the child's eighteenth birthday, of a *personal* relationship between them, as evidenced by (a) the father's written agreement to provide it with financial support until it reaches that age and (b) the father's voluntary acknowledgment of his paternity or a court adjudication confirming the fact." Majority opinion ("Maj. op.") at 8.

(1972).[2] The majority offers two rationales for the different treatment afforded men and women under the statute, both drawn from *Fiallo*. The first is that this approach will reduce fraudulent claims because there will generally be more reliable proof of maternity than paternity. The second is that distinguishing between the mothers and fathers of illegitimate children reflects the " 'perceived absence of close family ties' between illegitimate children and their natural fathers." Maj. op. at 10 (quoting *Fiallo*, 430 U.S. at 799). In the majority's language, " 'a desire to promote early ties to this country

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[2] Although my main complaint here is with *Fiallo*'s acceptance of stereotypes as a basis for distinguishing between the sexes, I pause to note that *Fiallo*'s application of the "facially legitimate and bona fide reason" standard to all immigration legislation, no matter how directly or severely that legislation interferes with fundamental rights of U.S. citizens, is also outdated. This standard may have been appropriate when the Court was moving from its longstanding refusal to subject immigration legislation to any scrutiny whatever to the position that immigration legislation is not immune from review. But this transition having been accomplished, it would seem more in keeping with current Supreme Court doctrine to use a standard that grants great weight to Congress' power over immigration yet also takes into account the degree to which a particular immigration law restricts the constitutional rights of U.S. citizens and the importance of the rights affected. *Cf. 44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (an absolute ban on the dissemination of truthful, nonmisleading commercial speech is subject to more rigorous review than a regulation that targets deceptive sales practices or leaves open alternative means of communication); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion restrictions should be judged by an undue burden standard that takes account of the degree to which a woman's right to terminate her pregnancy is infringed).

and to those relatives who are citizens of this country is not a[n ir]rational basis for the requirements made by' sections 1409(a)(3) and (4)." Maj. op. at 10 (quoting *Ablang v. Reno*, 52 F.3d 801, 806 (9th Cir.1995)).

There is nothing inherently illegitimate about either of these two goals. I am on common ground with the majority in believing that the government has a *bona fide* interest in ensuring that the children on which it confers citizenship are in fact the children of U.S. citizen parents. I also agree that requiring some sort of minimal "family ties" between parent and child, as well as fostering an early connection between child and country, is rational government policy. But these goals, however worthy, do not justify the imposition of a set of procedural hurdles on men – and only men – who wish to confer citizenship on their children.

Clearly the United States should not be in the business of conferring citizenship on people whose parentage is uncertain. *See Gomez v. Perez*, 409 U.S. 535, 538 (1973) (discussing "lurking problems with respect to proof of paternity"). But this problem, as the majority appears to concede, is satisfactorily addressed by the requirement of "clear and convincing evidence" of the father's paternity before a child can be declared a U.S. citizen. 8 U.S.C. § 1409(a)(1). Once parentage has been definitively established, there is no reason to require fathers, but not mothers, to take the additional step of formal legitimation and a written agreement to provide financial support before a child's 18th birthday. Before the advent of reliable genetic testing, this requirement of legitimation may well have been a reasonable method for preventing fraud, as false fathers would be more likely to claim paternity

once a child had reached majority and no financial responsibility to the child remained. In the absence of "clear and convincing" evidence of the blood tie, such as genetic testing, this legitimation requirement might well have been a useful proxy.

But Congress itself has acknowledged that genetic testing is extremely reliable. In the Child Support Enforcement Amendments of 1984, Congress required states, as a condition of receiving federal funds, to eliminate laws establishing statutes of limitation on proof of paternity:

> Relatively short statutes of limitation were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the child. *These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child* and therefore the obligation to support that child.

H. REP. NO. 527, 98th Cong., 1st Sess. 38 (1983) (emphasis added). Since Congress itself has acknowledged that the accuracy of genetic testing has "eliminate[d] the rationale" for time limits on the establishment of paternity, the fear of fraud cannot be a facially legitimate and *bona fide* reason for requiring fathers – and only fathers – to take

special actions to legitimate and agree to support their child by a certain date.

As a result, the majority places greater weight on the argument that requiring U.S. citizen fathers, but not U.S. citizen mothers, to legitimize and agree to give financial support to their children before they turn 18 fosters close and early ties between illegitimate children, the United States, and the relatives of the children. According to the majority, it is "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father. A mother is far less likely to ignore the child she has carried in her womb than is the natural father." Maj. op. at 10. The majority seems to believe that there automatically will be closer and earlier "family ties" between a mother and her illegitimate child than between a father and his illegitimate child. I agree with the majority that traditionally mothers more frequently have assumed primary responsibility for illegitimate children, although it is a subject of some debate whether this phenomenon is traceable as much to socialization and sexism as to biological necessity. But there is a world of difference between noting that men and women often fill different roles in society and using these different roles as the justification for imposing inflexible legal restrictions on one sex and not the other. To do the latter is to govern on the basis of stereotyping assumptions, an approach that has been repeatedly criticized by the Supreme Court. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"); *Duren v. Missouri*, 439 U.S. 357, 369 (1979) (state's practice of excluding women from jury

venire violated equal protection where it was justified only by stereotype of "safeguarding the important role played by women in home and family life"). As the Supreme Court said in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, ___, 114 S. Ct. 1419, 1422 (1994):

> Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

Just last term, in reviewing the exclusion of women from the Virginia Military Institute, the Court reiterated that any governmental justification for official action that distinguishes between men and women "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, ___ U.S. ___, ___, 116 S. Ct. 2264, 2275 (1996). While it is true that these cases represent instances where legislation was reviewed under heightened scrutiny, the tenor of the Court's castigation of gender stereotypes makes it highly doubtful that such stereotypes can ever serve as justifications for governmental action restricting the rights of citizens.[3]

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[3] In a recent speech, then-Solicitor General Drew S. Days explained that the United States did not seek certiorari in *Wauchope*, a Ninth Circuit case holding that the pre-1934 rule granting citizenship to the foreign-born children of U.S. citizen fathers but not to the foreign-born children of U.S. citizen mothers was unconstitutional, because it was convinced that the

Of particular significance to this case, the Court has been unwilling to countenance the use of stereotypes to justify lasting distinctions between the mothers and fathers of illegitimate children. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court struck down a New York statute that required the consent of a mother and not of a father for the adoption of an illegitimate child, arguing that stereotypes regarding the relationships mothers and fathers will have with their illegitimate children are only acceptable, if at all, in the child's infancy: "Even if unwed mothers as a class were closer to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* at 389. Subsequent case law has established that as the child gets older the extent of the mother's or father's relationship with the child becomes the only relevant basis on which to distinguish between them: "If one *parent* has an established custodial relationship with the child and the other *parent* has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two *parents* different legal rights." *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983).[4]

Ninth Circuit's decision was "consistent with modern developments in the Supreme Court's jurisprudence concerning statutory distinctions based on gender." Drew S. Days, Lecture, *The Solicitor General and the American Legal Ideal*, 49 SMU L.Rev. 73, 81 (1995); *Wauchope v. United States Dep't of State*, 985 F.2d 1407, 1416 (9th Cir.1993).

[4] The majority cites *Parham v. Hughes*, 441 U.S. 347 (1979), for the proposition that the "mothers and fathers of illegitimate children are not similarly situated." *Id.* at 355. *Parham* was a plurality opinion upholding a Georgia law that allowed only mothers of illegitimate children and fathers who had legitimated their children to sue for the wrongful death of the child. The crucial link in the Court's reasoning was the fact that Georgia provided that *only* the father could legitimize a child; the Court argued that the requirement that a father can only bring a wrongful death action if he has legitimated his child "does not reflect any overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child." *Id.* at 356. In other words, the Court explicitly based its finding that the mothers and fathers of illegitimate children are not similarly situated on the fact that under Georgia law only a father can legitimate an illegitimate child. *Id.* at 355-56. Of course, the real question then becomes whether a statute that allows fathers but not mothers to legitimate their illegitimate children is unacceptably based on stereotypes, but the Court refused to consider the constitutionality of the legitimization restriction on the grounds that a challenge to its constitutionality was not before the court. *Parham*, 441 U.S. at 355. Here, however, there is no underlying additional statute that excuses or explains the distinctions drawn between the U.S. citizen mothers and fathers of illegitimate children, and thus *Parham*'s holding appears irrelevant.

Needless to say, here we have a statute that distinguishes between fathers and mothers of illegitimate children a substantial period – 18 years – after birth, and does so in addition to requiring clear and convincing evidence of paternity. We also have a statute that accords different treatment to U.S. citizen mothers who fail to establish relationships with their illegitimate children until after they turn 18 than to U.S. citizen fathers in the same situation; the mothers can transmit their citizenship to their children despite the lack of an early relationship, whereas the fathers cannot.

As a general rule, of course, Congress is free to promote close family ties by ensuring that citizenship is conferred only on children who have at least minimal contact with citizen parents during their early and formative years. Thus, even though the line is arbitrary, I see no problem with a requirement that the U.S. citizen parent take some action to acknowledge parentage or responsibility for a child before the child reaches age 18. But this putative interest provides absolutely no basis for requiring fathers, and only fathers, to formally declare parentage and agree to provide financial support before a child reaches age 18. Such a distinction clearly derives from the stereotyping assumption that mothers automatically will be close to their illegitimate children whereas fathers will not, and under current jurisprudence such an assumption should not be considered a facially legitimate or *bona fide* reason for government action. In *Fiallo*, however, the Court held that the exact same assumption that fathers will not be close to their illegitimate children *was* a facially legitimate and *bona fide* reason for distinguishing between the mothers and fathers of illegitimate children in immigration legislation. *Fiallo*, 430 U.S. at 799. Notably, and regrettably, *Fiallo* treated the fear of legislating on the basis of stereotypes with a somewhat cavalier disdain, remarking in a footnote that any complaints that statutory distinctions between the illegitimate children of mothers and fathers and their illegitimate children are "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children" were more appropriately addressed to Congress. *Id.* at 799 n.9.

Fiallo is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S. Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LORELYN PENERO MILLER, Plaintiff, v. WARREN CHRISTOPHER, SECRETARY OF STATE, Defendant.	)	Civil Action No. 93-1182 (RCL)

MEMORANDUM OPINION AND ORDER

(Filed Apr. 29, 1994)

This matter comes before the court on defendant's motion to dismiss the complaint pursuant to 12(b)(1) of the Federal Rules of Civil Procedure. Upon consideration of the filings of counsel and the relevant law, defendant's motion to dismiss is GRANTED in accordance with this Memorandum Opinion and Order. This case is hereby DISMISSED.

Plaintiff, Lorelyn Penero Miller, was born in the Republic of the Philippines on June 20, 1970. Her mother is a Philippine national, and her father, Charlie Miller, is an American citizen.[1] The birth record reflects, however,

[1] On July 27, 1992, a Texas court entered a "voluntary paternity decree" declaring that Lorelyn Penero Miller is the child of Charlie R. Miller. Ms. Miller was twenty-two years of age at that time. *See* Pl.'s Mot. for Leave to File Supplemental Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss, Ex. 1.

that plaintiff was born "illegitimate," and a father's name and nationality does not appear in the record. *See* Def.'s Mot. to Dismiss, Ex. A.

In November, 1991, when she was twenty-one years old, plaintiff first filed an application for registration and documentation as a United States Citizen with the American Embassy in Manila. The application was denied in March, 1992. This decision was upheld in November, 1992 by Thomas W. Callow, Acting Director of the Office of Citizen Consular Services of the United States Department of State.

Plaintiff initiated this civil action in the United States District Court for the Eastern District of Texas. After the defendant moved to dismiss or, in the alternative, to transfer venue, plaintiff filed an amended complaint adding her father, Charlie Miller, as a co-plaintiff. The district court dismissed the claims of plaintiff Charlie Miller and ordered that the case be transferred to this jurisdiction where venue over Lorelyn Penero Miller's claims would be proper. *Lorelyn Penero Miller v. Secretary of State, Warren Christopher*, No. 6:93CV39, (Order of E.D. Tex., June 2, 1993).

The Fourteenth Amendment provides, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. Accordingly, plaintiff does not have a constitutional right under the Fourteenth Amendment to acquire citizenship. Moreover, plaintiff's father, Charlie Miller, has no constitutional right to transmit citizenship. *Rogers v. Bellei*, 401 U.S. 815, 830 (1971). Plaintiff, therefore, must

meet statutory requirements in order to acquire U.S. citizenship.

8 U.S.C. § 1409(a) sets forth the requirements for the acquisition of citizenship by a child born out of wedlock whose father is a U.S. citizen. As originally enacted, the paternity of the child born outside of wedlock to a father possessing U.S. citizenship must have been established by legitimation while the child was under the age of twenty-one. Legitimation could take place under the laws of the child's domicile or that of the father.

In 1986, § 1409(a) was amended and now contains the following provision:

> (a) The provisions . . . shall apply as of the date of birth to a person born out of wedlock if –
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the U.S. at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years –
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or

> (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1988).

Individuals such as Lorelyn Penero Miller, who were at least 15, but under 18, as of the date of the 1986 amendment of § 1409(a) may elect to apply either version of § 1409(a). Plaintiff's application was denied for failure to establish her legitimation prior to her twenty-first birthday and for failure to meet the requirements of § 1409(a)(3)-(4).

Plaintiff does not contend that she satisfied the requirements of 8 U.S.C. § 1409(a) for purposes of a grant of U.S. citizenship.[2] Rather, plaintiff alleges that the distinction between "legitimate" and "illegitimate" children is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *See* Pl.'s First Am. Compl., ¶ XII, § 1. She

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[2] Plaintiff filed a motion for leave to file supplemental memorandum of points and authorities in opposition to defendant's motion to dismiss in which she urges this court to interpret the voluntary paternity decree, *supra* note 1, which legitimated the plaintiff effective retroactively to her date of birth for the purpose of state law, as establishing the paternity of the plaintiff while she was under the age of eighteen years. The effect, the plaintiff argues, is that she now meets the requirements of § 1409(a)(4)(A). This court, however, agrees with the State Department's conclusion that a child born out of wedlock must be legitimated prior to her eighteenth birthday in order to meet the statutory requirements. *See* Pl.'s Mot. for Leave to File Supplemental Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss, Ex. 2.

therefore requests that the court declare her a citizen of the U.S. *See* ¶ XVII, § 2.

Defendant alleges, on the basis of the pleadings now before the court, that plaintiff's complaint should be dismissed for lack of subject matter jurisdiction because plaintiff lacks standing to adjudicate such a claim. The law is well settled that the party invoking federal jurisdiction bears the burden of establishing the following essential elements of the constitutional requirement of standing:

> 1. The plaintiff must have suffered an injury in fact – an invasion of a legally protected interest – which is concrete and particularized, and actual or imminent;
>
> 2. There must be a causal connection between the injury and the conduct complained of; and
>
> 3. It must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992).

Defendant does not contest that plaintiff has suffered an injury, nor that the injury was caused by the conduct at issue. Indeed, plaintiff has suffered an injury in that she has been denied U.S. citizenship for failing to meet the statutory requirements of 8 U.S.C. § 1409(a). Furthermore, there is a causal connection between this injury and her complaint that the statute is unconstitutional. However, defendant argues that plaintiff has failed to demonstrate any redressable injury. This court agrees.

In *INS v. Pangilinan*, the Supreme Court determined that the courts do not have the power to confer citizenship in the absence of statutory authority. The Court stated, "once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." *INS v. Pangilinan*, 486 U.S. 875, 884 (1988). Even if this court should conclude that 8 U.S.C. § 1409(a) is unconstitutional, this court could not grant citizenship to plaintiff. As defendant notes, this could only be accomplished by legislative action. Only Congress has the power to confer citizenship to persons not constitutionally entitled to citizenship. Therefore, this court concludes that plaintiff lacks standing because she does not meet the redressability requirement.

Accordingly, it is hereby ORDERED that defendant's 12(b) (1) motion to dismiss is GRANTED. It is further ORDERED that this case is DISMISSED.

It is further ORDERED that the plaintiff's motion for leave to file supplemental memorandum of points and authorities in opposition to defendant's motion to dismiss is GRANTED. The clerk shall also file plaintiff's "Comments on Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss" as a sur-reply.

SO ORDERED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: 4-29-94

APPENDIX C

United States Department of State

Washington, D.C. 20520

(LOGO) NOV - 5 1992

Dear Mr. Patterson:

I am responding to your September 10, 1992, letter regarding the citizenship of Lorelyn Penero Miller. I apologize for the delay in our response, but we felt we should consider carefully the points you raised before writing.

As Mr. Fred Smith of my staff informed you on October 16 and 26, and previously, this office is familiar with Ms. Miller's case. The American Embassy in Manila referred the matter to us when the case was first adjudicated in March, and again when it was reconsidered in August. In both instances, the Department concluded that Ms. Miller did not acquire U.S. citizenship.

Lorelyn Penero Miller was born out of wedlock to a U.S. citizen father and a Philippine mother on June 20, 1970, in Angeles City, Pampanga, the Philippines. Ms. Miller seeks to establish that she acquired U.S. citizenship through her U.S. citizen father under Section 301(a)(7) of the Immigration and Nationality Act of 1952, as made applicable by Section 309(a) of the Act. In order to establish a claim under Section 309(a) INA, a legal and a biological relationship must exist between the applicant and the citizen parent.

As you know, 22 C.F.R. 51.40 provides that the burden of proof is upon the applicant to establish a claim to U.S. citizenship. The Department is satisfied that Mr.

Charlie R. Miller, the putative father, is a U.S. citizen, that he possesses sufficient physical presence in the United States to transmit citizenship, and that there is sufficient evidence that he had access to the applicant's mother at the probable time of conception.

Since Ms. Miller's parents were never married, Section 309(a) INA, as amended, requires that she must be legitimated by her U.S. citizen father prior to attaining age eighteen under either the laws of her father's state of domicile in the United States or the laws of the Philippines. Under Article 269 of the Philippine Civil Code, natural children may only be legitimated by the intermarriage of the parents. On July 27, 1992, a Texas court entered a "voluntary paternity decree" declaring that Lorelyn Penero Miller is the child of Charlie R. Miller. Ms. Miller was twenty-two years of age at that time.

The Department is aware that, when a child is legitimated under state law, legitimation is effective retroactively to the time of the child's birth for the purpose of state law. The fact that an individual is considered legitimate from birth under state law does not, however, address the requirements of Section 309(a)(4) INA, which requires that a child born out of wedlock be legitimated before age eighteen in order to acquire U.S. citizenship under Section 301(g) INA (formerly Section 301(a)(7) INA). Without such legitimation before age eighteen, there is no legally recognized relationship under the INA and the child acquires no rights of citizenship through an American citizen parent.

Your letter directs the Department's attention to the case of *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991), where the Court concluded that the distinction in the INA between "legitimate" and "illegitimate" children is an unconstitutional violation of the equal protection clause. The Department of State was removed from that action. Although the Department of Justice did not appeal the Court's decision, neither the Department of State nor the Immigration and Naturalization Service are applying the decision in *LeBrun v. Thornburgh*. Section 309(a)(4) INA has not been repealed by the Congress or declared unconstitutional by the U.S. Supreme Court.

Thus, the Department must stand by its original finding that Ms. Miller failed to acquire United States citizenship because she was not legitimated prior to her eighteenth birthday. There appears to be a misapprehension on your part concerning the point of law involved. Your letter claims that the Department has misinterpreted Texas law concerning legitimation. While we accept your contention that there is no time limit under Texas law for legitimation of a child, there is a definite limit under the Immigration and Nationality Act (INA). Section 309(a)(4) of that Act requires that a child born out of wedlock must be legitimated under the laws of the persons's residence or domicile "while the person is under the age of eighteen years" in order to acquire U.S. citizenship under Section 301(g) (formerly 301(a)(7)) INA.

There is no administrative appeal process in an acquisition of citizenship case. Such cases always remain open, meaning that additional evidence to establish a claim to citizenship may be submitted at any time. We have now evaluated Ms. Miller's case three times, each

time reaching the same conclusion. We regret that our decision in this case cannot be favorable.

Sincerely,

/s/ Thomas W. Callow
Thomas W. Callow
Acting Director
Office of Citizen Consular Services

APPENDIX D

(LOGO)

EMBASSY OF THE
UNITED STATES OF AMERICA
MANILA, PHILIPPINES

August 11, 1992

Donald Ross Patterson
777 South Broadway
Tyler, TX 75701

Dear Mr. Patterson:

Thank you for your letter of July 30, 1992, regarding the registration as a U.S. citizen of Lorelyn Penero Miller.

We are forwarding a copy to the State Department of the petition decree which legitimizes Lorelyn, and we are asking that the case be reconsidered. Although the final determination will be made in Washington, in our opinion the petition decree legitimizes Lorelyn at birth. Should the Department agree with us, we will be most pleased to register her as a U.S. citizen and issue her a U.S. passport.

We will contact Lorelyn directly as soon as a decision is reached in this matter.

Sincerely,

/s/ Richard Rosenman
Richard Rosenman
Chief, Passport and Citizenship Unit

APPENDIX E

CAUSE NO. 92-1491-D

IN THE INTEREST OF	X	IN THE 321ST JUDICIAL
LORELYN PENERO MILLER, aka	X X X	DISTRICT COURT SMITH COUNTY, TEXAS
LORENA PENERO MILLER	X X	

VOLUNTARY PATERNITY DECREE

(Filed July 27, 1992)

On this date came on for hearing the Petition of Charlie R. Miller for Voluntary Paternity of Lorelyn Penero Miller.

The Court examined the pleadings and heard the evidence and argument of counsel. The Court finds that all necessary prerequisites of law have been legally satisfied, that this Court has jurisdiction of all the parties and subject matter of this cause and that no other Court has continuing jurisdiction. All persons entitled to citation were properly cited. No jury having been demanded, all matters in controversy were submitted by Court. The record of testimony was duly reported by Cheryl Toles.

The Court finds that the following child, is the subject of this case:

Name: Lorelyn Penero Miller Sex: Female
Birthplace: Angeles City, Republic of the Philippines
Birthdate: June 20, 1970

Present Residence: 1365 Mariveles Street.
Angeles City, Philippines
Social Security Number: _____

The Court finds that:

1. The parent-child relationship between the children and the natural mother of the children has not been terminated by a decree of a Court;

2. A statement of paternity has been executed by Charlie R. Miller as provided in the Texas Family Code, Chapter 13; and that the facts recited in the statement are true;

IT IS NOW ORDERED that Charlie R. Miller be and he is found to be the biological and legal father of Lorelyn Penero Miller. The parent-child relationship is created between the father and the child as if the child were born to the father and mother during marriage.

IT IS FURTHER ORDERED that the name of the child is Lorelyn Penero Miller.

Costs of Court are taxed against the party by whom incurred.

All other relief not expressly granted is denied.

Signed this the 27th day of July, 1992.

/s/ RUTH J. BLAKE, Judge
321st District Court
Judge Presiding

Supreme Court, U.S.
FILED
MAR 6 1997

(2)

No. 96-1060

In the Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
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19pp

QUESTION PRESENTED

Under the Immigration and Nationality Act of 1952, a person born abroad out of wedlock to a United States citizen father and an alien mother can become a United States citizen, as of the date of birth, only if the person is legitimated or paternity is acknowledged or adjudicated during the person's minority. 8 U.S.C. 1409(a). In contrast, a person born abroad out of wedlock to a United States citizen mother and an alien father is deemed a United States citizen at birth, without any requirement of legitimation or proof of maternity during the person's minority. 8 U.S.C. 1401(g). The question presented is:

Whether 8 U.S.C. 1409(a) violates the equal protection component of the Fifth Amendment's Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1060

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 96 F.3d 1467. The opinion of the district court (Pet. App. 26-31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1996. The petition for a writ of certiorari was filed on January 6, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the Philippines on June 20, 1970. She was born out of wedlock to a Filipino

mother and a United States citizen father, Charlie R. Miller, who was stationed in the Philippines as a member of the United States military. Her birth certificate identifies her mother as Luz Peñero; it does not identify her father's name or nationality. Pet. App. 2, 26-27.

2. Several months after her 21st birthday, petitioner applied to the Department of State for registration as a United States citizen. Pet. App. 2, 27. Her application was denied on the ground that she failed to establish paternity before her 21st birthday, as required by 8 U.S.C. 1409(a). Pet. App. 3-4, 29.[1] On

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[1] Section 1409(a) provides, in relevant part, that Section 1401(g), which confers citizenship on certain foreign-born children,

> shall apply as of the date of birth to a person born out of wedlock if —
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years —
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

July 27, 1992, Mr. Miller obtained a voluntary paternity decree from a Texas state court, establishing that he is petitioner's biological father. *Id.* at 4, 26 n.1. Petitioner submitted that paternity decree to the Department of State and requested reconsideration of her application. The Department of State, however, adhered to its original determination. *Id.* at 27, 32-35.

3. Petitioner then filed this action in the United States District Court for the Eastern District of Texas, alleging that 8 U.S.C. 1409(a) violates the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 4, 27. Respondent moved to dismiss or, in the alternative, to transfer venue. *Ibid.* The court transferred the case to the United States District Court for the District of Columbia. *Id.* at 5, 27.

After the transfer, respondent renewed the motion to dismiss, and the district court dismissed the action on the ground that petitioner lacked standing. Pet. App. 5, 26-31. The court determined that "[e]ven if this court should conclude that 8 U.S.C. § 1409(a) is unconstitutional, this court could not grant citizenship to [petitioner]," because "this could only be accomplished by legislative action." *Id.* at 31. Accordingly, the court held that petitioner "lacks standing because she does not meet the redressability requirement." *Ibid.*

Although this provision was amended in 1986 to require legitimation or establishment of paternity before the child's 18th birthday, petitioner falls within a narrow statutory age bracket that allowed her to meet these requirements before her 21st birthday. See 8 U.S.C. 1409 note (effective date of 1986 amendment).

4. The court of appeals held that petitioner has standing, but rejected her claim on the merits. Pet. App. 1-25. With respect to standing, the court of appeals concluded that if the district court had held Section 1409(a) to be unconstitutional, it could have found that she was a United States citizen pursuant to Section 1401(g).[2] "Such a finding would not have violated [the] proscription on the exercise of judicial equitable power to confer United States citizenship in the absence of legislative authority." Pet App. 7.

Turning to the merits, the court held (Pet. App. 8-9) that the appropriate standard of review for the constitutionality of Section 1409(a) is the "facially legitimate and bona fide reason" test of *Fiallo* v. *Bell*, 430 U.S. 787 (1977), in which the Court upheld the grant of certain immigration privileges to the alien children and parents of female United States citizens, but not to those of male United States citizens. The court of appeals, defining "the issue before us [as] whether the additional requirements imposed by Section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent," Pet. App. 10, found "the Supreme Court's decision in *Fiallo* to be dispositive on both counts." *Ibid.* It concluded that

> in light of [*Fiallo*'s] holding and the Court's reference to "the perceived absence of close family ties" between illegitimate children and their natural fathers as well as to the problems of proof in paternity determinations, we see no basis for concluding that section 1409(a) is unconstitutional. Rather, we conclude, as did the Ninth Circuit, that "a desire to promote early ties to this country and to those relatives who are citizens of this country is not a[n ir]rational basis for the [challenged statutory] requirements."

Id. at 12-13 (quoting *Fiallo*, 430 U.S. at 798-799, and *Ablang* v. *Reno*, 52 F.3d 801, 806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996)). The court of appeals further found it "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father," because "[a] mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." Pet. App. 13.

The court of appeals rejected petitioner's argument that the Texas state court's paternity decree applied retroactively to her birth, and that she therefore had satisfied Section 1409(a), even though the decree was issued after her 21st birthday. The court held that "[t]o allow Ms. Miller to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation." Pet. App. 14.

Judge Wald concurred in the judgment. Pet. App. 15-25. She criticized Section 1409(a) as "based simply on the stereotyping assumption that a mother will be closer to * * * children born out of wedlock," Pet. App. 16, and on outdated concerns about the difficulties of proving paternity, *id.* at 18-20. Judge Wald con-

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[2] Section 1401(g) of Title 8 confers citizenship from birth on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States," provided the United States citizen parent satisfies certain requirements of physical presence in the United States or its possessions.

cluded, however, that this Court's decision in *Fiallo* "forecloses us from holding that the imposition of [Section 1409(a)'s] requirements on U.S. citizen fathers but not on U.S. citizen mothers is unconstitutional." *Id.* at 16.

ARGUMENT

In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), this Court reaffirmed that judicial review of immigration and naturalization legislation is limited to determining whether a challenged provision is supported by "a facially legitimate and bona fide reason." *Id.* at 794-795. The court of appeals correctly concluded that *Fiallo* forecloses petitioner's challenge to Section 1409(a). Just last Term, this Court denied certiorari in *Ablang* v. *Reno*, 116 S. Ct. 701 (1996) (No. 95-505), which involved a virtually identical challenge to a predecessor to 8 U.S.C. 1409(a), and there have been no intervening developments that would support a different result in this case. Further review therefore is unwarranted.

1. *Fiallo* is dispositive of petitioner's claims, and she does not ask this Court to reconsider that decision. In *Fiallo*, petitioners challenged 8 U.S.C. 1101(b), a provision of the Immigration and Nationality Act of 1952 that granted preferential immigration status to the qualifying children or parents of United States citizens. 430 U.S. at 788. In the case of children born out of wedlock, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the child turned 18 and while the child was in the legal custody of the father. *Id.* at 788-789 & n.1. The petitioners alleged that the provision discriminated

unlawfully on the basis of sex, marital status, and illegitimacy; denied them due process by establishing "an unwarranted conclusive presumption"; and burdened various fundamental rights. *Id.* at 791.

In rejecting those arguments, the Court identified two "facially legitimate and bona fide reason[s]," *Fiallo*, 430 U.S. at 794, for Congress's decision not to extend preferential immigration status to nonlegitimated children of United States citizen fathers. First, there was "a perceived absence in most cases of close family ties" between fathers and their illegitimate children; second, there was "a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799. The Court noted that Congress might have given "substantial weight" to the "inherent difficulty of determining the paternity of an illegitimate child," which the Court found to be "compounded when it depends upon events that may have occurred in foreign countries many years earlier." *Id.* at 799 n.8.

The Court held in *Fiallo* that "[i]n the inevitable process of 'line drawing,'" it was "appropriate for Congress to consider not only the nature of [kinship] relationships but also problems of identification, administration and the potential for fraud." 430 U.S. at 795 n.6. The Court acknowledged that the law precluded relief even in cases in which a particular father and child could prove the existence and strength of their family relationship. *Id.* at 789. It also noted the petitioners' contentions that the provision was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children," and that then-existing administrative procedures could address problems of proving paternity. *Id.* at 799 n.9. It

concluded, however, that those arguments should be addressed to Congress, *ibid.*, because "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," *id.* at 799 (citing *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)).

The court of appeals correctly relied on *Fiallo* to conclude, first, that Congress legitimately may use immigration and citizenship statutes to promote early ties to relatives in this country; and second, that the greater likelihood that a father will lack close ties to his overseas illegitimate child justifies requiring special evidence of such ties. Pet. App. 10-14. Here, as in *Fiallo*, these "facially legitimate and bona fide" considerations justify Congress's "broad * * * policy choice[s]," and defeat petitioner's claim of "'double-barreled' discrimination based on sex and illegitimacy." *Fiallo*, 430 U.S. at 794-795.

There is no merit to petitioner's argument (Pet. 13) that *Fiallo* is not controlling because it involved the admission of alien relatives of United States citizens, while this case involves the grant of citizenship to the foreign-born offspring of United States citizens. The power "to establish an uniform Rule of Naturalization," Art. I, § 8, Cl. 4, including the power to confer citizenship on persons born outside the United States, "was long ago adjudged by this court to be vested exclusively in Congress." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898) (citing *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259 (1817)). The Ninth Circuit also has held that *Fiallo* governs the analysis of equal protection challenges to statutes that confer United States citizenship upon persons born abroad. *Ablang* v. *Reno*, 52 F.3d 801, 805-806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); *Wauchope* v. *United States Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993); *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990). Petitioner cites no holding by this Court or any court of appeals to the contrary, and we are aware of none.

2. Petitioner's reliance (Pet. 9-10) upon *Plyler* v. *Doe*, 457 U.S. 202 (1982), and *Trimble* v. *Gordon*, 430 U.S. 762, 772 (1977), is misplaced. Both cases reinforce the extraordinary deference courts accord congressional determinations concerning immigration and citizenship. *Trimble*, decided the same day as *Fiallo*, concerned an equal protection challenge to a state inheritance statute that permitted illegitimate children to inherit by intestate succession through their mothers but not through their fathers; the state supreme court had upheld the statute on the ground that a lineal relationship is more difficult to prove with respect to paternal ancestors. 430 U.S. at 770. This Court reversed, concluding that the acknowledged "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." *Id.* at 772. The statutory classification based on legitimacy, the Court concluded, was not "carefully tuned to alternative considerations." *Ibid.* (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 513 (1976)). In *Fiallo*, however, the Court expressly distinguished *Trimble*, based on precedent "clearly indicat[ing] that legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (quoting *Trimble*, 430 U.S. at 772 (quoting *Lucas*, 427 U.S. at 513)). Indeed, in *Fiallo*, the Court reiterated that, "in the exercise of its broad power over immigration and naturalization, 'Con-

gress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792 (quoting *Mathews* v. *Diaz*, 426 U.S. 76, 80 (1976)).

Plyler also directly reinforces *Fiallo*'s principle of deference to congressional determinations concerning "the character of a relationship between [an] alien and this country." *Plyler*, 457 U.S. at 225 (quoting *Diaz*, 426 U.S. at 80). The *Plyler* Court expressly reaffirmed "the federal prerogative to control access to the United States, * * * the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation," 457 U.S. at 219 n.19, and the judiciary's "unusual deference" to Congress's "delicate policy judgments" with respect to "admission to our Nation and status within our borders," *id.* at 225 (citing *Diaz*, *supra*; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); and U.S. Const. Art. I, § 8, Cl. 4). The Court then noted that States enjoy no such powers, 457 U.S. at 225; *id.* at 219 n.19, and concluded that once aliens were within a State's jurisdiction, lawfully or not, that State could not, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny education benefits to their children, absent a showing of a substantial state interest, *id.* at 230. Nothing in *Trimble* or *Plyler* suggests a departure from *Fiallo*'s "facially legitimate" standard for reviewing immigration and citizenship legislation, or from *Fiallo*'s conclusion that the relatively greater difficulty of proving paternity, and the relatively greater likelihood that fathers will lack close ties to their foreign-born illegitimate children, warrant a requirement that a child who claims to be the offspring of a male United States citizen establish that fact before attaining majority.

3. Petitioner's reliance (Pet. 19-21) upon the Ninth Circuit's decision in *Wauchope* v. *United States Department of State*, 985 F.2d 1407, 1414 (1993), is also mistaken. The statute invalidated in *Wauchope* awarded United States citizenship to the foreign-born offspring of United States citizen fathers and alien mothers, but not to the foreign-born offspring of United States citizen mothers and alien fathers. The asserted rationale for that distinction (which applied only to children born prior to 1934) rested on the proposition that many countries regarded the children of mixed-citizen marriages as obtaining the citizenship of the father. In that context, granting citizenship to the foreign-born children of United States fathers would not create problems of dual nationality, while conferring citizenship on the foreign-born children of United States mothers would. *Id.* at 1416. The Ninth Circuit invalidated the statute only because it concluded that the factual basis for the distinction was "simply incorrect," given that a "significant majority of countries" used gender-neutral principles to grant citizenship to children born on their soil. *Ibid.*[3] Here, by contrast, there is no evidence disproving the bona fide reasons relied upon in *Fiallo* and in the court of appeals below.

Indeed, the applicable Ninth Circuit precedent is not *Wauchope*, but *Ablang* v. *Reno*, 52 F.3d 801 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). There

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[3] Congress subsequently removed the statutory distinction at issue in *Wauchope*. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4306.

the Ninth Circuit found a rational basis[4] for the statute that preceded, and is virtually identical to, Section 1409(a).[5] That statute, like Section 1409(a), required children born abroad out of wedlock to United States citizen fathers and alien mothers to establish paternity during their minority in order to obtain United States citizenship, while children born abroad out of wedlock to United States citizen mothers and alien fathers were deemed United States citizens at birth. In *Ablang*, as here, the plaintiff was born out of wedlock in the Phillippines to a Filipino mother and an American father, and did not attempt to establish paternity until after the statutorily specified period had passed. There, as here, the plaintiff claimed that there was no rational basis to distinguish the foreign-born children of United States citizen mothers and the foreign-born children of United States citizen fathers.

The Ninth Circuit, relying on *Fiallo*, held that there was, indeed, a rational basis for the statute's proof-of-paternity requirements. "[I]n most cases," it observed, "there is a reasonable expectation that the

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[4] Although the Ninth Circuit has equated *Fiallo*'s "facially legitimate and bona fide reason" standard with the "rational basis" test (*Ablang*, 52 F.3d at 806 (citing *Wauchope*, 985 F.2d at 1414 n.3)), in our view the *Fiallo* standard is less rigorous than the rational basis test. Under either view, the court of appeals in this case correctly held that 8 U.S.C. 1409(a) is supported by a "facially legitimate and bona fide reason." Pet. App. 9-14.

[5] Because Ablang was born in 1946, she challenged the Nationality Act of 1940, the predecessor to the provision of the Immigration and Nationality Act of 1952 that petitioner challenges. The relevant requirements for proof of paternity under the two statutes are materially indistinguishable.

illegitimate child's maternal descent will be easier to trace than her paternal descent." 52 F.3d at 805. As for the time limit for establishing paternity, the court accepted as reasonable the government's contentions that "proof may be harder to obtain as the years go by" and that Congress had a legitimate "desire to promote early ties to this country and to those relatives who are citizens of this country." *Id.* at 805-806. The court of appeals below expressly agreed with those conclusions. Pet. App. 13.[6]

4. Contrary to petitioner's contention (Pet. 20-22), she never obtained United States citizenship, and she therefore was never deprived of her United States citizenship. Petitioner errs in asserting (Pet. 20) that 8 U.S.C. 1401(g) conferred citizenship upon her at birth, subject only to the condition subsequent of legitimization before her 21st birthday. Section 1409(a), which specifically addresses children born out of wedlock, is an express limitation on Section 1401(g), a general provision addressing citizenship of foreign-born children having one United States citizen parent. Section 1409(a) makes clear that Section 1401(g) "shall apply" to a person in petitioner's circumstances only "if" two conditions are met: first, her father must agree to provide for her support during her minority; and second, paternity must be acknowledged or adjudicated, or she must be legitimated, before she reaches the age of 21. Thus, the court of appeals correctly concluded that peti-

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[6] Petitioner's reliance (Pet. 8-11, 18-19) upon *LeBrun* v. *Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991), is similarly misplaced. *LeBrun* is flatly inconsistent with *Fiallo*, *Ablang*, and the District of Columbia Circuit's decision in this case, and because it is only a district court decision, it furnishes no basis for granting review here.

tioner could be declared a citizen by virtue of the general rule of Section 1408(g) only if it declared the specific rule of Section 1409(a) unconstitutional. Pet. App. 6-7. Accord *Ablang*, 52 F.3d at 803 (agreeing that "citizenship does not inhere under the [predecessor provision] unless and until paternity is established, provided this takes place by the age of majority").

Similarly, petitioner errs in arguing (Pet. 22) that the Texas state court decree should be given retroactive effect to the date of her birth. Section 1409(a) clearly provides that a foreign-born child of a United States citizen father may obtain citizenship through her father only if she is legitimated or paternity is established "while the person is under the age of [21] years." As the court of appeals correctly held, "[t]o allow Ms. Miller to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation." Pet. App. 14; see *Ablang*, 52 F.3d at 802 (denying citizenship application where plaintiff submitted, after her 21st birthday, her United States citizen father's affidavits acknowledging paternity and genetic testing results proving paternity by a 95.77% probability). Accordingly, petitioner has presented no basis to conclude that the court of appeals erred in denying her application for citizenship or that her case warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1997

Supreme Court, U.S.
FILED
JUN 12 1997
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No. 96-1060

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
Secretary of State of the United States,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Appendix B Memorandum Opinion and Order, U.S. District Court ..... App. 26

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 94-5160

Lorelyn P. Miller, Appellant

v.

Warren Christopher, Secretary of State,
Appellee

RELEVANT DOCKET ENTRIES

6/29/94 CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Lorelyn Penero Miller. [59607-1] (lvs)

8/9/94 NOTICE filed by Appellant Lorelyn Penero Miller. FINAL transcript status notice filed [66918-1]. Transcripts will not be needed in this case. Certificate of service date 8/5/94. (lvs)

8/9/94 MOTION filed (5 copies) by Appellant Lorelyn Penero Miller (certificate of service dated 8/5/94) <STYLED AS MOTION TO DISPENSE WITH APPENDIX> [66921-1] (lvs)

6/30/95 CLERK'S ORDER filed granting motion to dispense with appendix filed by Lorelyn Penero Miller [66921-1]; Appellant is directed, however, to include the complaint and the relevant district court order(s) as an attachment to her brief. (cwc)

6/30/95 CLERK'S ORDER filed to schedule oral argument [133187-1] before Judge Initials: PMW DBS KLH on 11/21/95; establishing the initial briefing schedule [133187-2]: (Note: This is a Reg case) Appellant's brief due on 9/6/95;

Appellee's brief due on 10/6/95; Appellant's reply brief due on 10/20/95. (cwc)

9/7/95 BRIEF filed by Appellant Lorelyn Penero Miller [147352-1]. Copies: 15. Certificate of service date 9/6/95. (lej)

10/6/95 BRIEF filed by Appellee Warren Christopher [154843-1]. Copies: 15. Certificate of service date 10/6/95. [BRIEF HAS A GREY COVER]. (jth)

10/10/95 CORRECTED BRIEF filed by Appellee Warren Christopher [154848-1]. Copies: 15. Certificate of service date 10/10/95. [BRIEF HAS RED COVER]. (jth)

10/23/95 REPLY BRIEF filed by Appellant Lorelyn Penero Miller [157826-1]. Copies: 15. Certificate of service date 10/20/95. (jas)

11/21/95 ORAL ARGUMENT HELD before Wald, Buckley, Henderson . . . (ddm)

10/8/96 JUDGMENT for the reasons in the accompanying opinion affirming in part [227810-1], to remand case to the USDC [227810-2] Before Judges Wald, Henderson, Buckley. (edb)

10/8/96 OPINION (12 pgs) for the Court filed by Judge Buckley*, CONCURRING OPINION (8 pgs) filed by Judge Wald. * At the time of oral argument, Judge Buckley was a circuit judge in active service. He assumed senior status on 9/1/96. (edb)

1/8/97 NOTICE filed by Supreme Court of the United States, informing the Court that a writ of certiorari was filed January 6, 1997, Case No. 96-1060 [249241-1]. (lvs)

4/30/97 NOTICE filed by Clerk, Supreme Court advising of an order entered 04/28/97 granting certiorari. Supreme Court Docket No. 96-1060. [269409-1] (jth)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET NO. 1:93cv1182

Lorelyn P. Miller, Plaintiff

v.

Warren Christopher, Secretary of State,
Defendant

RELEVANT DOCKET ENTRIES

6/11/93 1 ORIGINAL FILE, certified copy of transfer order and docket sheet received from USDC for the Eastern District of Texas, Tyler Division (6:93cv39) (dot) [Entry date 06/14/93]

8/9/93 8 MOTION filed by defendant WARREN CHRISTOPHER to dismiss action; Exhibits (3) (sm) [Entry date 08/10/93]

9/17/93 12 RESPONSE by plaintiff(s) LORELYN PENERO MILLER in opposition to motion to dismiss action [8-1] by WARREN CHRISTOPHER "Let this be filed" (fiat) JUDGE LAMBERTH (dot) [Entry date 09/21/93]

10/18/93 20 REPLY by defendant WARREN CHRISTOPHER to response to motion to dismiss

action [8-1] by WARREN CHRISTOPHER (pob) [Entry date 10/19/93]

4/29/94 23 MEMORANDUM AND ORDER by Judge Royce C. Lamberth: granting motion for leave to file supplemental memorandum of points and authorities in opposition to defendant's motion to dismiss [21-1] by LORELYN PENERO MILLER, granting motion to dismiss action [8-1] by WARREN CHRISTOPHER (fle)

4/29/94 25 SUPPLEMENTAL MEMORANDUM by plaintiff LORELYN MILLER to motion to dismiss action [0-1] by WARREN CHRISTOPHER; exhibits (3) (dot) [Entry date 06/16/94]

5/3/94 24 REPLY by plaintiff(s) LORELYN PENERO MILLER to defendant's reply to plaintiff's opposition to motion to dismiss action [8-1] by WARREN CHRISTOPHER (dot)

6/15/94 26 NOTICE OF APPEAL by plaintiff(s) LORELYN PENERO MILLER from order [23-1] entered on: 4/29/94. $5.00 filing fee and $100.00 docketing fee paid USDC. Copy mailed to Douglas A. Wickham. (Attorney for plaintiff Donald Ross Patterson, 777 South Broadway; Suite 106, Tyler, Texas 75701-1648, (903) 592-8186, is not a member of the DC Bar.) (dot) [Entry date 06/16/94]

6/16/94 – TRANSMITTED PRELIMINARY RECORD on appeal [26-1] by LORELYN PENERO MILLER to U.S. Court of Appeals (dot)

6/30/94 – USCA # 94-5160 assigned for appeal [26-1] by LORELYN PENERO MILLER (dot) [Entry date 07/01/94]

12/18/96 27 CERTIFIED COPY of judgment filed in USCA dated 10/8/96, on appeal [26-1], remanding for further proceedings. OPINION USCA 94-5160 (cjp)

[END OF DOCKET: 1:93cv1182]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

LORELYN PENERO MILLER and CHARLIE R. MILLER Plaintiffs	X X X	CIVIL ACTION NO. 6:93 CV 39
V.	X X	FIRST AMENDED COMPLAINT
SECRETARY OF STATE, WARREN CHRISTOPHER Defendant	X X X	(Filed Mar. 31, 1993)

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, Lorelyn Penero Miller, is a citizen of the United States, owing allegiance thereto and is a resident of the Angeles City, Republic of the Philippines. Plaintiff Charlie R. Miller is a citizen of the United States and a resident of Smith County, Texas.

I.

Defendant, Warren Christopher, is the duly appointed, qualified, confirmed, and acting Secretary of State and head of the Department of State of the United States of America and as such is the official charged with all granting and issuing of passports under 22 USC Section 211a. Defendant maintains his offices as Secretary of State in the District of Columbia.

II.

This is an action for declaratory judgment and injunctive relief pursuant to 28 USC Sections 2201 and 2202 and is brought for the purpose for determining a question of actual controversy between the parties as hereinafter more fully appears.

III.

Jurisdiction of this action is based on 5 USC Section 704 and 28 USC Section 1331. Venue lies in this Court under 28 USC Section 1391.

IV.

In November, 1991, Plaintiff, Lorelyn Penero Miller, duly applied to defendant for registration as a United States Citizen and for issuance of a passport pursuant to 22 USC Section 211a and 22 CFR Sections 51.3 and 51.20.

V.

The application of Plaintiff, Lorelyn Penero Miller, was denied in a letter dated March 23, 1992.

VI.

Additional documentation was provided and reconsideration of the application was requested by Counsel in a letter dated July 30, 1992.

VII.

On August 21, 1992, attorney for Plaintiff received a letter dated August 11, 1992 from Richard Rosenman, Chief, Passport and Citizenship Unit, United States Embassy, Manila stating:

> "Thank you for your letter of July 30, 1992, regarding the registration as a U.S. citizen of Lorelyn Penero Miller.
>
> We are forwarding a copy to the State Department of the petition decree which legitimizes Lorelyn, and we are asking that the case be reconsidered. Although the final determination will be made in Washington, in our opinion the petition decree legitimizes Lorelyn at birth. Should the Department agree with us, we will be most pleased to register her as a U.S. citizen and issue her a U.S. passport.
>
> We will contact Lorelyn directly as soon as a decision is reached in this matter."

VIII.

In September, 1992, Plaintiff, Lorelyn Penero Miller, received a notice dated August 28, 1992 from Richard Rosenman, Vice Consul, United States Embassy, Manila, Philippines, informing her that her application for registration as a United States Citizen had been denied for the stated reason that her legitimation had not occurred prior to her eighteenth birthday.

IX.

On September 10, 1992 a request for reconsideration was sent to Ms. Monica Gaw, Chief of East Asia and Pacific Division, office of Citizens Consular Services, Department of State, Washington, DC 20520.

X.

On November 16, 1992, notice was received from the Defendant dated November 5, 1992, informing Plaintiff that Thomas W. Callow, Acting Director, Office of Citizens Consular Services, had upheld the decision denying recognition as a United States Citizen and a passport to the Plaintiff, Lorelyn Penero Miller.

XI.

The Defendant's letter of November 5, 1992 advises that there is no administrative appeal process in this case.

XII.

Defendant's action in denying Plaintiff, Lorelyn Penero Miller, recognition as a United States Citizen and a passport is illegal, null and void and of no effect for the following reasons:

1. The distinction in the Immigration and Nationality Act of 1952 between "legitimate" and "illegitimate" children is an unconstitutional violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

2. The United States Government has acknowledged that Lorelyn Penero Miller is the daughter of Charlie R. Miller and some years from now she will be allowed to come to the United States as an immigrant. If she were "legitimate" she would be able to come as a citizen. She is thus denied equal protection of law.

3. Plaintiff, Lorelyn Penero Miller, has hereby been deprived of the right to travel abroad as a United States Citizen without due process of law in violation of the 5th Amendment of the United States Constitution.

4. The decree which legitimizes Lorelyn Penero Miller does so as of birth and the interpretation of The Passport and Citizenship Unit reflected in their letter of August 11, 1992 is correct and should have been adopted by Defendant.

XIII.

Plaintiff, Lorelyn Penero Miller, would be awarded citizenship, even though illegitimate, if her mother rather than her father were a citizen. The statute makes Plaintiff, Charlie R. Miller's citizenship irrelevant at this point. He is not allowed to pass on his citizenship to his daughter even though a female in his position could.

XIV.

Plaintiff, Charlie R. Miller, acknowledges that Congress can restrict the ability of citizen parents to transmit their citizenship to their foreign born children. However, having allowed parents to transmit citizenship to their

children pursuant to its Article I, Section 8 power, Congress may not violate his right to equal protection under the laws by utilizing the suspect classification of gender without justification.

XV.

In view of the Defendant's action as aforesaid, and Plaintiffs' contention that such action is illegal, null and void, there is an actual controversy within the jurisdiction of this Court, and declaratory and injunctive relief will effectively adjudicate the rights of the parties.

XVI.

Plaintiffs have exhausted their administrative remedies, and have no adequate remedy at law.

XVII.

Plaintiff, Lorelyn Penero Miller has information concerning their case which is not readily available from any other source.

WHEREFORE, Plaintiffs pray that:

1. The Defendant be ordered to provide Plaintiff Lorelyn Penero Miller with appropriate documentation to enable her to attend and participate in the trial of this case.

2. The Court render declaratory judgment that the Plaintiff Lorelyn Penero Miller is a citizen of the United States and is entitled to all the rights and privileges of

citizens of the United States including a right to possess a passport.

3. Defendant be permanent enjoined from denying Plaintiffs' application of the basis of "illegitimacy".

4. That Defendant be ordered to grant Plaintiffs' application forthwith.

5. The Court grant such other and further relief as it may deem necessary and proper.

Dated: 31 March 1993

Respectfully submitted,

/s/ Donald Ross Patterson
Donald Ross Patterson
Attorney for Plaintiffs
Bar Card No. 15622000

777 South Broadway, Suite 106
Tyler, Texas 75701-1648
(903) 592-8186

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing First Amended Complaint was sent to the attorney of record, Traci L. Kenner, Assistant United States Attorney, 110 North College, Suite 700, Tyler, Texas 75702 on this the 31st day of March, 1993.

/s/ Donald Ross Patterson
Donald Ross Patterson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LORELYN PENERO MILLER, Plaintiff, v. WARREN CHRISTOPHER, SECRETARY OF STATE, Defendant.	)	Civil Action No. 93-1182 (RCL)

MOTION TO DISMISS

Defendant, by and thorough his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court pursuant to Rule 12(b)(1), (6), Federal Rules of Civil Procedure for dismissal of this Civil Action. The Court is without jurisdiction to grant the relief requested in this case, and plaintiff lacks standing. The defendant further submits that the complaint fails to state a claim upon which relief may be granted, and the defendant is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ J. Ramsey Johnson
J. RAMSEY JOHNSON, BAR NO. 243253
United States Attorney

/s/ John D. Bates
JOHN D. BATES, BAR NO. 934927
Assistant United States Attorney

/s/ John C. Martin
JOHN C. MARTIN, BAR NO. 180711
Assistant United States Attorney

LCR Form No. 1A
(Birth-available)

Republic of the Philippines
OFFICE OF THE LOCAL CIVIL REGISTRAR
Angeles City

February 10, , 19 92

TO WHOM IT MAY CONCERN:

We certify that, among others, the following facts of birth appear in our Register of Births on page 95 of book number 32:

LCR registry number	:	3041
Date of registration	:	06/30/70
Name of child	:	LORENA PENERO
Sex	:	Female
Date of birth	:	June 20, 1970
Place of birth	:	Christ the King hospital
Name of mother	:	LUZ PENERO
Nationality of mother	:	Filipino
Name of father	:	- -
Nationality of father	:	- -
Date of marriage of parents	:	illegitimate
Place of marriage of parents	:	- - -
This certificate is issued to	:	LORENA PENERO

upon his/her request.

VERIFIED BY:

Ronaldo C. Angeles
Clerk III

PROCESO A. MEJIA, M.D., MPH
City Health Officer
Civil Registrar — RA 3700

For the Local Civil Registrar:

SALUD F.
Civil Registry

Amount paid	: P	10.00
O.R. No.	:	
Date paid	:	02/10/92

Note: This certication is not valid if it has mark of [illegible] of any entry.

DEFENDANT'S EXHIBIT A

15

APPLICATION FOR ☐ PASSPORT ☐ REGISTRATION

SEE INSTRUCTIONS—TYPE OR PRINT IN ▪ WHITE AREAS

1. NAME First NAME | MIDDLE NAME

LAST NAME

2. MAILING ADDRESS

STREET

CITY, STATE, ZIP CODE

COUNTRY | IN CARE OF

☐ 5 Yr. ☐ 10 Yr. Issue Date

R D O DP End. # Exp.

3. SEX Male Female | 4. PLACE OF BIRTH City, State or Province, Country | 5. DATE OF BIRTH Mo. Day Year | 6. SEE FEDERAL TAX LAW NOTICE ON REVERSE SIDE | SOCIAL SECURITY NUMBER 0 0 0 0 0 0 0 0 0

7. HEIGHT Feet Inches | 8. COLOR OF HAIR | 9. COLOR OF EYES | 10. (Area Code) HOME PHONE | 11. (Area Code) BUSINESS PHO

12. PERMANENT ADDRESS (Street, City, State, ZIP Code) | 13. OCCUPATION NONE

FOLD

14. FATHER'S NAME	BIRTHPLACE	BIRTH DATE	U.S. CITIZEN	16. TRAVEL PLANS (Not Mandatory)
			☑ YES ☐ NO	COUNTRIES / DEPARTURE DA
15. MOTHER'S MAIDEN NAME	**BIRTHPLACE**	**BIRTH DATE**	**U.S. CITIZEN**	LENGTH OF ST
			☐ YES ☑ NO	

17. HAVE YOU EVER BEEN ISSUED A U.S. PASSPORT? YES ☐ NO ☑ IF YES, SUBMIT PASSPORT IF AVAILABLE. ☐ Submit

IF UNABLE TO SUBMIT MOST RECENT PASSPORT, STATE ITS DISPOSITION: COMPLETE NEXT LINE

NAME IN WHICH ISSUED | PASSPORT NUMBER | ISSUE DATE (Mo., Day, Yr.) | DISPOSITION

SUBMIT TWO RECENT

FOLD

18. HAVE YOU EVER BEEN MARRIED? ☐ YES ☑ NO DATE OF MOST RECENT MARRIAGE Mo. Day

WIDOWED/DIVORCED? ☐ YES ☐ NO IF YES, GIVE DATE Mo. Day

SPOUSE'S FULL BIRTH NAME | SPOUSE'S BIRTHPLACE

19. IN CASE OF EMERGENCY, NOTIFY (Person Not Traveling With You) (Not Mandatory) RELATIONSHIP MOTHER

FULL NAME

ADDRESS 4140 MARIVELES ST. CORAZON BLVD. 2004 | (Area Code) PHONE NUMBER

20. TO BE COMPLETED BY AN APPLICANT WHO BECAME A CITIZEN THROUGH NATURALIZATION

I IMMIGRATED TO THE U.S. (Month, Year) | I RESIDED CONTINUOUSLY IN THE U.S. From (Mo., Yr.) To (Mo., Yr.) | DATE NATURALIZED (Mo., Day, Yr.) | PLACE

21. DO NOT SIGN APPLICATION UNTIL REQUESTED TO DO SO BY PERSON ADMINISTERING OATH

I have not, since acquiring United States citizenship, performed any of the acts listed under "Acts or Conditions" on the reverse of this application form (unless explanatory statement is attached). I solemnly swear (or affirm) that the statements made on this application are true and the photograph attached is a true likeness of me.

Subscribed and sworn to (affirmed) before me 12 Nov 92 (Month) (Day) (Year)

(Signature of person authorized to accept application)

Dec 4/11/92 (SEAL)

☐ Clerk of Court or ☐ PASSPORT Agent ☐ Postal Employee ☒ (Vice) Consul USA At Manila, Philippines

X Lorelyn Miller

(Sign in presence of person authorized to accept application)

22. APPLICANT'S IDENTIFYING DOCUMENTS ☐ PASSPORT ☐ DRIVER'S LICENSE ☐ OTHER (Specify)

ISSUE DATE Month Day Year | EXPIRATION DATE Month Day Year | PLACE OF ISSUE | No. | ISSUED IN THE NAME OF

23. FOR ISSUING OFFICE USE ONLY (Applicant's evidence of citizenship) Avios Cleared

☐ Birth Cert. ☐ BR ☐ CR City Filed/Issued:
☐ Passport Bearer's Name:
☐ Report of Birth
☐ Naturalization/Citizenship Cert. No.:
☐ Other:
☐ Been & Returned
☐ Attached

I/O Cleared

DEFENDANT'S EXHIBIT C

APPLICATION APPROVED

Examiner Name

Office, Date

FEE EXEC. POST Manila, Philippines

16

08-06-1993 13:16 P.02/18

APPLICATION FOR ☐ PASSPORT ☐ REGISTRATION

SEE INSTRUCTIONS—TYPE OR PRINT IN INK IN WHITE AREAS

1. NAME (First Name) LORELYN (Middle Name) PEÑERO
(Last Name) MILLER
2. MAILING ADDRESS #1363 MARIVELES ST., CLARKVIEW SUBD.
ANGELES CITY 2009
PHIL.
3. SEX ✓ 4. PLACE OF BIRTH (City, State or Province, Country) ANGELES CITY, PAMPANGA PHIL. 5. DATE OF BIRTH 06 20 70
6. HEIGHT 4 | 11 7. COLOR OF HAIR BROWN 8. COLOR OF EYES HAZEL
9. PRESENT PERMANENT ADDRESS (Street, City, State, Zip Code) #1363 MARIVELES ST., CLARKVIEW SUBD. ANGELES CITY 2009
10. TELEPHE NONE

	BIRTHPLACE	BIRTH DATE	U.S. CITIZEN
11. FATHER'S NAME CHARLIE RAY MILLER	VAN ZANT, TEXAS	JAN. 28, 19[illegible]	☑ YES ☐ NO
12. MOTHER'S MAIDEN NAME LUTGARDA L. PEÑERO	LEYTE	FEB. 28, 1949	☐ YES ☑ NO

13. IF UNABLE TO SUBMIT MOST RECENT PASSPORT, STATE BY WHICH ISSUED PASSPORT NUMBER

14. IF CHILD UNDER 14 YEARS OF AGE, NAME OF PARENT OR LEGAL GUARDIAN WHO WILL ACCOMPANY CHILD LUTGARDA P. RASPOTNIK MOTHER
#1363 MARIVELES ST. CLARKVIEW SUBD.

X/ Lorelyn Miller

FOR PASSPORT AGENCY USE ONLY (Applicant's signature)

17

08-06-1993 13:18

BEST AVAILABLE COPY

SUPPLEMENTAL APPLICATION STATEMENT TO BE COMPLETED AS REQUIRED BY CONSUL

- ☑ First Time Applicant
- ☐ Referred to Department for Decision
- ☐ Marriage Prior to March 2, 1931
- ☐ Resided Outside United States Over 10 Years Since Last Application

DCP

(First name) (Middle name) (Last name)

I LORELYN PEÑERO MILLER a United States citizen, do solemnly swear (affirm) to the following statements:

I CEASED TO RESIDE IN THE UNITED STATES ON OR ABOUT	I DEPARTED FROM THE UNITED STATES ON (Date)
N/A	N/A

I DEPARTED BY	NAME OF SHIP OR AIRLINE COMPANY	PLACE OF DEPARTURE
☐ Ship ☐ Airline	N/A	N/A

I HAVE SINCE RESIDED IN THE FOLLOWING COUNTRIES	I AM NOW RESIDING IN (Name of country)
PHILIPPINES	PHILIPPINES ☐ Permanently ☑ Temporarily

MY REASONS FOR SUCH FOREIGN RESIDENCE ARE

TO LIVE WITH MY FATHER

DATA ON BROTHERS AND SISTERS, LIVING AND DECEASED

NAME	DATE AND PLACE OF BIRTH		PRESENT ADDRESS
FRANCES P. RASPOTNIK	10-21-58	ANGELES CITY	#1385 MARIVELES ST.
FRANCIS P. RASPOTNIK JR.	12-28-62	ANGELES CITY	CLARKVIEW SUBD.
MICHAEL P. RASPOTNIK	12-29-65.	ANGELES CITY	2009 ANGELES CITY
JOSEPH MARTIN P. RASPOTNIK	10-12-86	ANGELES CITY	

IF ANY BROTHERS AND/OR SISTERS HAVE APPLIED FOR A PASSPORT OR REGISTRATION, FURNISH FOLLOWING INFORMATION

NAME	DATE OF APPLICATION	PLACE OF APPLICATION

OTHER REFERENCES IN THE UNITED STATES

NAME	ADDRESS
CHARLIE RAY MILLER	RT 1 BOX 221 BEN WHEELER, TEXAS 75754

SCHOOLS ATTENDED IN THE UNITED STATES

NAME	ADDRESS	PERIOD OF ATTENDANCE
N/A		

BAPTISMAL DATA	CHURCH	ADDRESS	DATE
	HOLY ROSARY PARISH	ANGELES CITY	NOV. 8, 1970

MARRIAGE PRIOR TO MARCH 3, 1931

The following section is to be completed by a woman applicant (or a wife to be included in a passport or registration) who, (1) was previously married before March 3, 1931, and (2) has not been issued or included in a United States passport or registration as a United States citizen abroad since March 3, 1931.

PREVIOUS MARRIAGE TERMINATED BY	DATE TERMINATED
☐ Death ☐ Divorce	
NAME OF FORMER HUSBAND (First, middle, last)	PLACE OF HIS BIRTH (City, state)

IF FORMER HUSBAND WAS BORN OUTSIDE OF THE UNITED STATES, COMPLETE ONE OF THE FOLLOWING:

☐ HE WAS NATURALIZED AS A U.S. CITIZEN ON	PLACE (City, state)	NATURALIZATION CERTIFICATE NO.

☐ HE OTHERWISE ACQUIRED U.S. CITIZENSHIP AS FOLLOWS

☐ FORMER HUSBAND WAS NOT A U.S. CITIZEN

I have (read) (had read to me in the _____ language) the contents of this application and I swear that I understand the statements contained herein.

Lorelyn P. Miller
(Signature of Applicant)

50179-201

OPTIONAL FORM 178A
(FORMERLY FS-176S)
MARCH 1973
DEPT. OF STATE

18

EMBASSY OF THE
UNITED STATES OF AMERICA
MANILA, PHILIPPINES

INFORMATION QUESTIONNAIRE

Date: 2/11/92

1. NAME: Lorelyn Miller
   Other names also known by, if any: Lore

2. PRESENT ADDRESS: 1365 Mariveles St. Clarkview Subd. Angeles City

3. PLACE OF BIRTH:
   DATE OF BIRTH: June 20, 1970

4. Have you ever lived in the United States (including Hawaii, Guam and Alaska)? no
   If so, give the following information concerning each period of such residence:

DATES From	To	ADDRESS	CITY	STATE

5. (a) On what date did you last leave the United States? not applicable
   (b) By what means? (State name of ship or airline.) none
   (c) Through what port? none
   (d) Accompanied by whom? (Give names and relationships.) none

6. Give the following information concerning each period of residence outside the United States:

Dates	Barrio or Street Number	Addresses City or Town	Country
1970 - 1982	Brgy. Takuranga Leyte		Phil.
1982 - 1991	1365 Mariveles St. Clarkview	Angeles City	Phil.

7. Schools attended:

From	To	Grade or Year	Name and address of school
1976	- 1977	Grade I	Holy Infant College - Tacloban
1977	- 1979	Grade II - III	Ritchie Elem. - Tacloban
1979	- 1982	Grade IV - VI	Nelga Elem. - Leyte
1981	- 1982	1st yr.	Leyte Institute - Tacloban
1982	- 1985	2nd yr.	Angeles University - Angeles
1982 - 1985		3rd - 4th yr.	REC - Angeles City
1985 - 1991		1st to 4th yr. college	Holy Angel University, Angeles City

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July 1982

19

8. Supply the following information concerning your employment:

From	To	Kind of Work	Name of Employer	Address
		NO		

9. Were you naturalized as a citizen of the United States? Yes/No. If yes, give the number of your Certificate of Naturalization, and the date and place you were naturalized. _____

10. (a) Are you married? NO.
    (1) Name of spouse NONE
    (2) Date and place of marriage NONE
    (3) Date and place of his or her birth NONE
    (4) What is his or her nationality? NONE
    (5) What is his or her present address? NONE
    (6) Has this marriage been terminated? ____. If so, give the date and cause of termination _____

    (b) Have you ever been previously married? No. If so, please furnish the following information:

Name of Previous Spouse(s)	Date of Marriage	Place of Marriage	Date Marriage Terminated	Cause of Termination
	NONE			

    (c) Have your spouse ever been previously married? If so, please furnish the following information:

Name of Previous Spouse(s)	Date of Marriage	Place of Marriage	Date of Marriage Terminated	Cause of Termination
	NO			

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July 1982

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PAGE.005

11. Do you have any children? no. If so, how many? none. Give the following information regarding all of your children (living and deceased).

Name	Date of Birth	Place of Birth	Present Address
	none		

12. Do you have a legal domicile in the United States? If so, give the name of the State no. Do you have corroborative evidence to show that you are a legal domicile of such State? none. If so, please indicate such evidence.

13. (a) What is your father's name? Charlie Miller
(b) Other names also known by, if any Charlie
(c) What is his nationality? American
(d) Where was he born? Texas U.S.A
(e) Date of his birth? Jan 28, 1944
(f) What is his present address? (If deceased, give the date and place of death.) Route I Box 321, Bay View Texas
(g) If he was born outside the United States, did he emigrate to the United States (including Hawaii, Guam and Alaska)? If so, when? no
And during what years did he reside in the U.S. since birth
(h) Was your father ever naturalized as a citizen of the United States? no
If so, supply the following information:
(1) Date of Naturalization not applicable
(2) Place of Naturalization not applicable
(3) Certificate of Naturalization No.
(i) Did your father ever serve in the Armed Forces of the United States? yes - USAF
If so, give the inclusive dates
(j) Was your father ever a civilian employee of the United States Government outside the U.S.? yes. If so, give the inclusive dates, position held and employer:

14. (a) What was your mother's maiden name? Estigoy
(b) Other names also known by, if any Lucy
(c) What is her nationality? Filipina
(d) Where was she born? Lingig
(e) Date of birth? Feb 28, 1948
(f) What is her present address? (If deceased, give date and place of death.) 1865 Normandie Dr. Rowland Heights, Los Angeles Co
(g) If she was born outside the United States, did she emigrate to the United States? no. If so, when? not applicable and during what years did she reside in the U.S.?

(h) Was your mother ever naturalized as a citizen of the U.S.? no.
If so, supply the following information:
(1) Date of Naturalization not applicable
(2) Place of Naturalization not applicable
(3) Certificate of Naturalization No.

(i) Was your mother ever employed with the U.S. Government outside the United States? no. If so, give the inclusive dates, position held and employer:

15. Were your parents married? no. IF "YES" please furnish:
Date of marriage n/a
Place of marriage n/a
Has this marriage been terminated? no. If "YES" please furnish:
Date of termination n/a
Cause of termination n/a
Place (of death, divorce or annulment?) n/a
How many times was your father married? 1. If more than once, give:

Name of Wife Other than your mother	Date & Place of Marriage	If Marriage Terminated, give date & cause
Sandra Middlebrooks	May 9, 1981 - Van Zandt, Texas	May 22, 1986 - divorce

How many times was your mother married? 1. If more than once, give:

Name of husband Other than your father	Date & Place of Marriage	If Marriage Terminated give date & cause
Frank Rasputnik	Jan 24, 1987 - Angels City	no

16. Give the following information concerning all your brothers and sisters of the full blood (living or deceased).

Name	Place of Birth	Date of Birth	Present Address
	n/a		

17. Give the following information concerning all your half-brothers and half-sisters (living and deceased).

Name	Place of Birth	Date of Birth	Present Address
Frankie Rasputnik	Angels City	Oct. 21, 1980	same address as client
Jessica Rasputnik Jr.	Angels City	Dec. 10, 1981	
Michael Rasputnik	Angels City	Dec. 9, 1978	

Dual citizenship

18. Are you a citizen of the Philippine Republic? Y or of country other than the U.S.? _____. If yes, please furnish:
Name of country _____
Date of citizenship acquired _____
How acquired _____

19. Have you ever taken an oath or made an affirmation or other formal declaration of allegiance to the Philippine Republic or any other foreign state? no. If so, give date and other details and supply documentary evidence, if available: _____

20. Have you ever entered, or served in, the armed forces of the Philippine Republic or any other foreign state? no. If so, give dates and other details: _____

21. Have you ever accepted, or performed the duties of , any office, posts, or employment under the government of the Philippine Republic or any other foreign state or of any political subdivision thereof? no. If so, give dates and other details: _____

22. Have you ever made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state? no
If so, give date and other details: _____

23. Have you ever been convicted by a court martial or a court of competent jurisdiction of the commission of any act of treason against, or of attempting by force to overthrow, or of bearing arms against the United States? no. If so, give details _____

24. (a) Who obtained for you the evidence (birth certificate, etc.) that you are presenting in support of your claim to American citizenship? mother
(b) What is his or her address? 1365 Mariveles St. Mandaluyong Mnl
(c) What is his or her relationship to you? mother
(d) When did you receive it? _____

25. Do you know any person(s) in the United States or Hawaiian Islands who can furnish information concerning your identity and the date and place of your birth? _____. If so, supply the following information:

Name	Address	Relationship	Place & date he or she last saw you

Supply similar information concerning persons in the Philippines who have personally known you since your childhood:

Name	Address	Relationship	Place & date he or she last saw you
Teodora Alvarado	- 960 Tarlac St. Cal. Angeles City	- mil	- 1970

I hereby affirm that the statements made above are true and that, if I execute a formal application for registration as an American citizen or for an American passport, they may be regarded as a part of such application.

Carolyn Miller
Signature of Applicant

TITLE 18 United States Code. 1542. False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement,

Shall be fined not more than $2,000 or imprisoned not more than five years or both. (June 25, 1948, 62 Stat. 771, eff. September 1, 1948).

NEL/FPT-4A
July 1982

Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

No. 96-1060

(4)

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
Secretary of State of the United States,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONER

DONALD ROSS PATTERSON
Attorney for Petitioner
Texas Bar Number 15622000

777 South Broadway, Suite 106
Tyler, Texas 75701
(903) 592-8186
Fax (903) 597-3811

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTION PRESENTED FOR REVIEW

Is the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

PETITIONER:

Lorelyn Penero Miller

RESPONDENT:

Madeleine K. Albright, Secretary of State of the United States

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The distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers is a violation of the Fifth Amendment to the United States Constitution

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PETITIONER'S BRIEF

Lorelyn Penero Miller hereby requests this Court reverse, in part, the judgment of the District of Columbia Circuit of the Court of Appeals, and remand with instructions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 96 F.3d 1467 and is reproduced at Appendix A of the Petition for Writ of Certiorari at 1 [hereinafter Pet. App.]. The Memorandum Opinion and Order, April 29, 1994, Royce C. Lamberth, United States District Judge, Civil Action No. 93-1182, U.S. District Court, District of Columbia is reported at 870 F. Supp. 1 and is reproduced at Appendix B, Pet. App., at 26. The decision of Thomas W. Callow, Acting Director, Office of Citizen Consular Services, dated, November 5, 1992, is found in Appendix C, Pet. App., at 32.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was pursuant to 5 U.S.C. Section 704 and 28 U.S.C. Section 1331. The jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. Section 1291 (Final Decisions of District Courts). The appeal was filed June 15, 1994 from

a Memorandum Opinion and Order, entered on April 29, 1994, dismissing the case.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition concerns the due process clause of the Fifth Amendment with its guarantee of equal protection under the law.

8 U.S.C. Section 1401. Nationals and citizens of the United States at birth

The following shall be nationals and citizens of the United States at birth: . . .

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United

States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and . . .

8 U.S.C. Section 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title shall apply as of the date of birth to a person born out of wedlock if –

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years –

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405 of this Act, [8 USCS], the provisions of section 1401(g) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

STATEMENT OF THE CASE

A. Factual Background

The Plaintiff, Lorelyn Penero Miller, was born on June 20, 1970, in Angeles City, Republic of the Philippines, the daughter of Luz Penero, a Philippine citizen, and Charlie R. Miller, a United States citizen. The Plaintiff's parents were not married at the time of her birth, nor did they subsequently marry. Her father, Charlie R. Miller, was a United States serviceman who left the Philippines upon the conclusion of his tour of duty. On July 27, 1992, the 321st Judicial District Court of Smith County, Texas signed a Voluntary Paternity Decree declaring, at

the request of Charlie R. Miller, that the Plaintiff was his biological and legal child. The decree legitimizes Lorelyn at birth (Appendix E, Pet. App. at 37).

In November 1991, Plaintiff, Lorelyn Penero Miller, duly applied to Defendant for registration as a United States citizen and for issuance of a passport pursuant to 22 U.S.C. Section 221A and 22 C.F.R. Sections 5.13 and 5.120. The application was denied in a letter dated March 23, 1992. A copy of the Voluntary Paternity Decree and other information was provided to the Defendant and reconsideration of the application by the Defendant was requested. In a letter, dated August 11, 1992, from Richard Roseman, Chief Passport and Citizenship Unit, United States Embassy, Manila, it was stated:

> "Thank you for your letter of July 30, 1992 regarding the registration as a U.S. citizen of Lorelyn Penero Miller.
>
> We are forwarding a copy to the State Department of the petition decree which legitimizes Lorelyn, and we are asking that the case be reconsidered. Although the final determination will be made in Washington, in our opinion the petition decree legitimizes Lorelyn at birth. Should the Department agree with us, we will be most pleased to register her as a U.S. citizen and issue her a U.S. passport.
>
> We will contact Lorelyn directly as soon as a decision is reached in this matter." (Appendix D, Pet. App., at 36)

In a subsequent letter dated August 28, 1992, Mr. Roseman informed the Plaintiff, Lorelyn Penero Miller, that her application for registration as U.S. citizen had

been denied for the stated reason that her legitimation had not occurred prior to her eighteenth birthday.

In a notice dated November 5, 1992, Plaintiff was informed that Thomas W. Callow, Acting Director, Office of Citizens Counselor Services, had upheld the decision denying Plaintiff recognition as a U.S. citizen and denying a passport to the Plaintiff (Appendix C, Pet. App., at 32). The Plaintiff then filed suit in the Eastern District of Texas on January 22, 1993. The Plaintiff's father, Charlie R. Miller, was dismissed as a Plaintiff and the case was transferred to the United States District Court for the District of Columbia by an Order signed on the 2nd day of June, 1993.

B. Proceedings Before the District Court

In a Memorandum Opinion and Order (Appendix B, Pet. App. 26) filed April 29, 1994, the case was dismissed by Judge Royce C. Lamberth, United States District Judge for the District of Columbia, on the basis that Ms. Miller lacked standing.

C. Proceedings Before The Court of Appeals

The Plaintiff appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals held:

> . . . that Ms. Miller had standing to bring this action; but in light of controlling Supreme Court precedent, we conclude that the challenged statute [8 U.S.C. § 1409] is constitutional." (Appendix A, Pet. App. at 2)

The Court of Appeals believed that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977) foreclosed it from holding 8 U.S.C. Section 1409 unconstitutional.

Judge Wald wrote a separate opinion in which she "regretfully" concurred in the judgment against Ms. Miller. She concluded:

> *Fiallo* is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Appendix A, Pet. App. at 25)

SUMMARY OF ARGUMENT

The Plaintiff seeks a finding that she was a U.S. Citizen by birth. Using the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. Citizen mothers and U.S. Citizen fathers is unconstitutional.

The Court has held that parties who seek to defend gender based distinctions contained in statutes must demonstrate an "exceedingly persuasive justification." That a statute discriminates against males rather than females does not exempt it from scrutiny.

8 U.S.C. Section 1409 discriminates both on the basis of "legitimate" and "illegitimate" and on the basis of gender of parents. It punishes children for the conduct of their parents. The children of male U.S. citizens "can effect neither their parents' conduct nor their own status".

The government seizes upon the problem of proof of paternity. The Court has held that while this can not be lightly brushed aside, neither can it be an impenetrable barrier. Statutes must be "carefully tuned to alternative considerations". 8 U.S.C. Section 1409 is not. It denies equal protection because it only applies where the American citizen parent is the father. There is no rational basis for this distinction. Modern genetic testing eliminates the rationale for arbitrary time limits on the establishment of paternity for a child.

8 U.S.C. Section 1409 will not pass a rational basis test, much less a requirement for an "exceedingly persuasive justification". Intentional discrimination on the basis of gender violates the Equal Protection Clause where it serves to ratify and perpetuate "overbroad stereotypes about the relative abilities of men and women". 8 U.S.C. Section 1409 is another "overbroad generalization" which violates equal protection.

Fiallo v. Bell, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) is out of step with this standard and the more resent decisions of the Supreme Court and other Courts. Further, *Fiallo* can be distinguished because this case represents not a congressional determination that various

aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance.

ARGUMENT

Is the distinction in 8 U.S.C. Section 1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment to the United States Constitution?

The District Court did not reach the issue of constitutionality of 8 U.S.C. Section 1409(a). The Court of Appeals felt that *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) was controlling.

> As a practical matter, there is no distinction between the rights under the Act of the legitimate and illegitimate children of American women born outside the United States and its possessions. In each instance, only the fact of the mother's U.S. citizenship at the time of the child's birth need be established. Therefore, the issue before us is whether the additional requirements imposed by section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent. We find the Supreme Court's decision in *Fiallo* to be dispositive on both counts. (Appendix A, Pet. App. at 10)

Whether *Fiallo v. Bell*, 440 U.S. 787, 52 L.Ed.2d 50, is dispositive is open to question. The Ninth Circuit correctly points out in *Wauchope v. U.S. Department of State*, 985 F.2d 1407 (9th Cir. 1993):

> "Unlike the Government decision at issue in *Fiallo* and *Mandel*, Section 1993 represents not a Congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance. This type of decision strikes us as fundamentally different from one concerning individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it."

While this references another section, the reasoning applies with equal vigor to Section 309. The present case can be distinguished and relief can be granted to the Petitioner without overturning *Fiallo*.

However, as Judge Wald, in her concurring opinion, concludes:

> . . . I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Appendix A, Pet. App., at 25)

This Court has stated in *U.S. v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2274 (1996):

> Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

In demonstrating that "exceedingly persuasive justification":

> The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 73 L.Ed.2d 1090, 102 S.Ct. 3331, 3336 citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 64 L.Ed.2d 107, 100 S.Ct. 1540, 1545 (1980)

In *Mississippi University for Women*, 458 U.S. at 723, 102 S.Ct. at 3335, the Court states:

> That this statutory policy discriminates against males rather that against females does not exempt it from scrutiny or reduce the standard of review.

The Court further states at 458 U.S. 724, 102 S.Ct. 3336:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.

While only a district court decision, *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991), is a well reasoned opinion which analyzes *Fiallo v. Bell*. In it the Court finds the statute in question, INA Section 309 (8 U.S.C. Section 1409), is unconstitutional because of its requirement that a foreign born child of a U.S. male citizen be formally

legitimated by the age of twenty-one (now amended to age eighteen). The Court stated:

> The discrimination in § 309 between persons on the basis of "illegitimacy" is an archaic reminder of past discriminatory treatment of individuals in society, both in terms of the stigma of the label "illegitimate" with which it branded the children of unwed parents, and in terms of the sex discrimination that was reflected in the law that a man could "legitimate" a child whereas a woman could not. In addition to being inhumane and unfair in this way, a distinction on the bases of "legitimacy" is also an impractical distinction in today's society where unwed mothers abound, and single parenthood has become norm . . .
>
> Accordingly, the court concludes that the distinction in the Act between the "legitimate" and "illegitimate" children is an unconstitutional violation of the Equal Protection Clause . . . " *LeBrun* at 1213

It appears the opinion of the District Court was so well reasoned that the government did not see fit to take an appeal to the Circuit Court.

In *Trimble v. Gordon*, 430 U.S. 762, 772, 97 S.Ct. 1459, 1466, 52 L.Ed.2d 31 (1977) the Court established a standard for examining statutes that distinguish between "legitimates" and "illegitimates", under which the question is whether the statute "is carefully tuned to alternative considerations". The Court took into account "the lurking problems with respect to the proof of paternity" but noted that while these problems

> . . . are not to be lightly brushed aside, . . . neither can they be made into an impenetrable barrier that works to shield otherwise insidious discrimination . . . (430 U.S. at 771, 97 S.Ct. at 1466).

In *LeBrun v. Thornburgh* at 1211, it is stated:

> . . . The Court concludes that § 309 is not "carefully attuned to alternative considerations". Even under a minimum rationality standard, the distinction made in Section 309 of the statute must fail. Moreover, under the standard articulated in *Rogers v. Bellei*, the distinction is not only unreasonable and arbitrary, but it is also, under the Equal Protection Clause, unlawful.

In *LeBrun*, the Court also observes that the statute conditions the retention of citizenship upon an official act by the father of illegitimate children. Courts have long recognized that the rights of one cannot be made contingent upon the rights of another and an individual keeps his citizenship unless "he voluntary relinquishes it". *LeBrun* at 1211 citing *Afroyim v. Rusk*, 387 U.S. 253, 262, 87 S.Ct. 1660, 1665, 18 L.Ed.2d 757 (1967).

In *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) the Supreme Court invalidated the Texas statute which withheld, from local school districts, any state funds for the education of children who were not legally admitted into the United States, and which authorized local school districts to deny enrollment to such children. The Court held the statute violated the Equal Protection Clause of the Fourteenth Amendment, stating the children, who were the Plaintiff's in the case before it, "can effect neither their parents' conduct nor

their own status". The Court held that to punish children for the conduct of their parents "does not conform with fundamental concepts of justice". The Court went on to cite its ruling in *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406-07, 37 L.Ed.2d 768 (1972):

> . . . visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual – as well as unjust – way of deterring the parent.

In *LeBrun v. Thornburgh*, at 1212, the Court says:

> "It is wrong for a father to have the unilateral ability to confer or deny citizenship to his daughter."

Mr. Miller does not wish to deny citizenship to his daughter. Under Texas law she will inherit his property as his daughter. Section 309(a)(4), as interpreted by the Defendant, violates the Equal Protection Clause.

8 U.S.C. Section 1401(g) grants nationality and citizenship to a person born outside the geographical limits of the United States and its outlying possession who has one parent who is a U.S. citizen who resided in the United States prior to the person's birth.

Plaintiff meets the requirements of this section in that she was born in the Philippines and her father, Charlie R. Miller, satisfies the parental requirement. 8 U.S.C. Section 1409, "Children born out of wedlock", takes away the

grant of citizenship conferred by Section 1401(g) unless certain things have occurred during the minority of the child: a) the person is legitimate under the law of the person's residence or domicile; b) the father acknowledges paternity of the person in writing under oath; or c) the paternity of the person is established by adjudication of a competent court. The language of 8 U.S.C. Section 1401(g) is a blanket grant of citizenship to a group. This group includes the Plaintiff. But we have a later attempt in 8 U.S.C. 1409 to take away, or limit, that blanket grant and to take it away from illegitimate children of U.S. citizen fathers.

8 U.S.C. Section 1409 is an unconstitutional violation of the Equal Protection Clause because it applies only when the American citizen parent is a man – the father. It does not apply to situations where the American citizen parent is a woman – the mother. Moreover, it requires that the acts of legitimation or "adjudication" be undertaken and completed during the minority of the child. There are two forms of constitutionally impermissible discrimination in 8 U.S.C. Section 1409 – discrimination against illegitimate children as a class as well as gender based discrimination.

In the context of this Federal Nationality Statute, the Due Process Clause of the Fifth Amendment has been found to provide equal treatment co-extensive with that of the Equal Protection Clause of the Fourteenth Amendment. See *Boiling v. Sharpe*, 347 U.S. 497 (1954).

In defending 8 U.S.C. Section 1409, the Defendant has stated:

> The government also has an obvious interest in insuring that there is, in fact, a blood relationship between the child seeking American citizenship and American citizen parent. Maternity is rarely a factual issue, whereas paternity is frequently placed in issue in the human experience. The possibility for fraud in connection with citizenship claims based upon the father's American citizenship, therefore, is more likely, and more difficult to prove or disprove. (Page 9 of Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss.)

In her concurring opinion in the Court of Appeals, Judge Wald states:

> Unlike the majority, I see no rational basis for a law that requires a U.S. citizen father, but not a U.S. citizen mother, to formally legitimate a child before she reaches majority as well as agree in writing to provide financial support until that date or forever forfeit the right to transmit citizenship. Rather, I believe that this requirement is based simply on the stereotyping assumption that a mother will be closer to her child born out of wedlock than a father will be to his. Unfortunately, however, I also believe that the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), forecloses us from holding that the imposition of such requirements on U.S. citizen fathers but not on U.S. citizen mothers is unconstitutional, and thus, I regretfully concur in the judgment against Ms. Miller. (Appendix A, Pet. App., at 15)

Judge Wald concludes:

> Notably, and regrettably, *Fiallo* treated the fear of legislating on the basis of stereotypes with a somewhat cavalier disdain, remarking in a footnote that any complaints that statutory distinctions between the illegitimate children of mothers and fathers and their illegitimate children are "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children" were more appropriately addressed to Congress. *Id.* at 799 n.9.

Fiallo is a Supreme Court decision directly on point and, as a result, we have no choice but to hold section 1409(a) constitutional. Yet I think it is important to underscore the extent to which *Fiallo* is out of step with the Court's current refusal to sanction "official action that closes a door or denies opportunity to women (or to men)" based on stereotypes or "overbroad generalizations" about men and women. *Virginia*, 116 S.Ct. at 2275. *Fiallo* is a precedent whose time has come and gone; it should be changed by Congress or the Supreme Court. (Concurring Opinion, p. 8.) (Appendix A, Pet. App. at 25)

In *Albang v. Reno*, 52 F.3d 801, 805 (9th Cir. 1995), cert. denied, 116 S.Ct. 701 (1996), the Court upheld a provision of the Nationality Act of 1940, 54 Stat. 1137, concerning illegitimate children, citing in support of its decision, a note from *Fiallo v. Bell*:

> The inherent difficulty of determining the paternity of a illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier.
>
> 43 U.S. at 799 n. 8, 97 S.Ct. at 1482 n. 8

The question can be asked: Do these difficulties change at a given age as to the father, but not as to the mother?

> Before the advent of reliable genetic testing, this requirement of legitimation may well have been a reasonable method for preventing fraud, as false fathers would be more likely to claim paternity once a child had reached majority and no financial responsibility to the child remained. In the absence of "clear and convincing" evidence of the blood tie, such as genetic testing, this legitimation requirement might well have been a useful proxy.
>
> But Congress itself has acknowledged that genetic testing is extremely reliable. In the Child Support Enforcement Amendments of 1984, Congress required states, as a condition of receiving federal funds, to eliminate laws establishing statutes of limitation on proof of paternity:
>
> > Relatively short statutes of limitation were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the child. *These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child* and therefore the obligation to support that child.

> H. REP. No. 527, 98th Cong., 1st Sess. 38 (1983) (emphasis added). Since Congress itself has acknowledged that the accuracy of genetic testing has "eliminate[d] the rationale" for time limits on the establishment of paternity, the fear of fraud cannot be a facially legitimate and *bona fide* reason for requiring fathers – and only fathers – to take special actions to legitimate and agree to support their child by a certain date. (Concurring Opinion, Court of Appeals) (Appendix A, Pet. App. at 18)

The government acknowledges that 8 U.S.C. Section 1409 makes distinctions based on gender in the ability to transmit citizenship. In *LeBrun v. Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991) discussed above, Judge Sarokin found that:

> The Court concludes that the applicable law discriminates against "illegitimate" children, and thereby violates the Equal Protection Clause of the United States Constitution. The law as it then existed and as applied in this matter serviced to make the citizenship of children born out of wedlock to American fathers, particularly those serving in the armed forces, subject to the personal vagaries and consciences of their fathers. Those who choose to act with honor could confer such citizenship, and those who chose not to, could deny citizenship to their offspring. Even the dilatory father, as in this same case, could defeat his child's claim to citizenship merely by delaying the recognition of his responsibility, until it was too late to satisfy the residency requirements.

> Those who have no choice in the marital state of their parents should not be so penalized or stigmatized, and their rights to citizenship should not be dependant on the moral fortitude (or lack thereof) of one of their parents. The unfairness is exacerbated by placing such power in the hands of the male parent. The law was thus discriminatory in its impact upon children born out of wedlock and sexist in making citizenship dependent upon the acquiescence of the male parent only. *LeBrun v. Thornburgh,* F. Supp. at 1206.

In addition to *LeBrun v. Thornburgh,* the United States Ninth Circuit Court of Appeals, in *Wauchope v. Department of State,* 985 F.2d 1407 (9th Cir. 1993), hereinafter cited as *Wauchope,* declared unconstitutional a nationality law which also drew unlawful distinctions among transmitting citizenship on the basis of gender.

Section 1993 of the Revised Statutes of 1874, allowed American citizen males, but not American citizen females, the right to pass on their citizenship to foreign born offspring. The Court in *Wauchope* found this statute's impermissible gender-based discrimination was constitutionally infirm as a violation of the equal protection component of the Fifth Amendment's due process clause. See also *Elias v. Department of State,* 721 F. Supp. 243 (N.D. Cal. 1989), where, just as in the later *Wauchope,* the District Court found unlawful gender-based discrimination. The Justice Department abandoned the appeal of *Elias v. Department of State.* Congress subsequently removed the statutory distinction at issue in *Wauchope.* See Immigration and Nationality Technical Corrections Act of 1994. Pub. L. No. 103-416 § 101, 108 Stat. 4306.

Illegitimate children are not recognized as a suspect class and therefore the strict scrutiny standard of equal protection analysis does not apply.

In *Wauchope* the Ninth Circuit applied the rational basis test to determine whether there was a factually legitimate and *bona fide* reason for the discrimination.

In *U.S. v. Virginia,* ___ U.S. ___, ___, 116 S.Ct. 2264, 2275 (1996), the Court indicated a party seeking to uphold government action based on sex must establish an **exceedingly persuasive justification** for the classification and must at least show that the challenged classification serves important government objective. The justification must be genuine and not hypothesized or invented *post hoc* has in response to litigation. Nor can it rely on overbroad generalizations about the difference between males and females.

The legislative history does not articulate any Congressional purpose for the "take away" provision in 8 U.S.C. Section 1409 directed against illegitimate children. The Government argues that the problem of proof should be recognized as a rational basis for the legitimation provisions of 8 U.S.C. Section 1409. The Government's proof rationale fails as either a factually legitimate or *bona fide* reason to justify the unequal treatment. The proof of fatherhood proposal, if recognized, would be constitutionally infirmed as under inclusive as to a Plaintiff who was recognized as being the illegitimate daughter and, in

fact, has been legitimated under the laws of the State of Texas.

The Court of *Wauchope* noted that:

> . . . courts "need not, in equal protection cases except at face value assertions of legislative purposes, when . . . the asserted purpose could not have been the goal of legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) "[W]e [must be] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained." *Christian Science Reading Room v. City and County of San Francisco*, 792 F.2d 124, 124 (9th Cir. 1986) quoting *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1097 (3rd Cir 1981) *cert. denied*, 479 U.S. 1066 (1987). *Wauchope*, 985 F.2d at 1415.

Therefore, consistent with the Ninth Circuit's constitutional analysis in *Wauchope*, there is no rational basis and no factually legitimate and *bona fide* reason that exists to justify the legitimation requirement of 8 U.S.C. Section 1409. The requirements were strictly based on stereotypes of the era when enacted.

Judge Wald seems to agree, stating:

> Once parentage has been definitively established, there is no reason to require fathers, but not mothers, to take the additional step of formal legitimation and a written agreement to provide financial support before a child's 18th birthday. (Appendix A, Pet. App. at 18)

If then 8 U.S.C. Section 1409 is unconstitutional under the rational basis test, there certainly is not the "exceedingly

persuasive justification" required by *Mississippi University for Women*, 458 U.S. at 731, 102 S.Ct. at 3340 that must be the solid base for any gender defined classification.

> Of particular significance to this case, the Court has been unwilling to countenance the use of stereotypes to justify lasting distinctions between the mothers and fathers of illegitimate children. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the Court struck down a New York statute that required the consent of a mother and not of a father for the adoption of an illegitimate child, arguing that stereotypes regarding the relationships mothers and fathers will have with their illegitimate children are only acceptable, if at all, in the child's infancy: "Even if unwed mothers as a class were closer to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* at 389. Subsequent case law has established that as the child gets older the extent of the mother's or father's relationship with the child becomes the only relevant basis on which to distinguish between them: "If one *parent* has an established custodial relationship with the child and the other *parent* has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two *parents* different legal rights." *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983). Needless to say, here we have a statute that distinguishes between fathers and mothers of illegitimate children a substantial period – 18 years – after birth, and does so in addition to requiring clear and convincing evidence of paternity. We also have a statute that

> accords different treatment to U.S. citizen mothers who fail to establish relationships with their illegitimate children until after they turn 18 than to U.S. citizen fathers in the same situation; the mothers can transmit their citizenship to their children despite the lack of an early relationship, whereas the fathers cannot. (Appendix A, Pet. App. at 22)

As was true of the statute in *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760 (1979), 8 U.S.C. Section 1409(a) is another example of "overbroad generalizations" in gender-based classifications.

In *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, ___, 114 S.Ct. 1419, 1422, 128 L.Ed.2d 89 (1994), the Court reaffirmed that intentional discrimination on the basis of gender violates the Equal Protection Clause, particularly where "the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."

The Court should again reaffirm that fact in this case. *Fiallo v. Bell*, 430 U.S. 787 (1977), is out of step with the standards applied by the Court in more recent cases and should not remain as precedent in the future.

CONCLUSION

The Petitioner respectfully requests the Court to reverse, in part, the judgment of the District of Columbia Circuit of the Court of Appeals, and remand with instructions.

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the distinction in Section 309 of the Immigration and Nationality Act, 8 U.S.C. 1409, between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers violates the Fifth Amendment to the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1060

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 96 F.3d 1467. The opinion of the district court (Pet. App. 26-31) is unreported, as is the earlier order of the district court for the Eastern District of Texas (App., *infra*, 9a-12a).

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1996. The petition for a writ of certiorari was filed on January 6, 1997, and granted on April 28, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. Petitioner was born in the Philippines on June 20, 1970. Local birth records identify petitioner's mother as Luz Penero, a Philippine national; they do not identify a father. Petitioner alleges that her biological father is Charlie Miller, a United States citizen, who at the time of conception was a 23-year-old member of the United States military on duty in the Philippines. Mr. Miller never married Ms. Penero. Pet. App. 2, 26-27, 32-33; J.A. 21.

In February 1992, several months after her 21st birthday, petitioner applied to the Department of State for registration as a United States citizen. Pet. App. 2, 27; J.A. 15-24. Without resolving the issue of biological paternity, the Department denied petitioner's application on the ground that she had not established any formal legal and financial relationship with her putative father either "while [petitioner was] under the age of twenty-one years by legitimation," as required by former Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a) (1982), or before she turned 18 under the legitimation-or-acknowledgment provisions of present Section 309(a). Pet. App. 3-4, 28-29.

In July 1992, Charlie Miller obtained a voluntary paternity decree in state court, establishing as a matter of Texas law that he is petitioner's "biological and legal father" and declaring that "[t]he parent-child relationship is created between the father and the child as if the child were born to the father and the mother during marriage." Pet. App. 37-38. Petitioner submitted that decree to the State Department and requested reconsideration of her application for registration as a citizen. After reviewing the matter, however, the Department adhered to its original determination. *Id.* at 32-35.

2. Petitioner filed this action in the United States District Court for the Eastern District of Texas, alleging,

among other things, that the INA's different treatment of legitimate and illegitimate children violated principles of equal protection. 1/21/93 Compl. 3. The government moved to dismiss the complaint, pointing out, among other things, that there was no basis for venue in the Eastern District of Texas. See Pet. App. 27. Petitioner then amended her complaint to add Charlie Miller as a plaintiff, and also added a new claim that the INA's different treatment of citizen mothers and citizen fathers prohibited Mr. Miller from "pass[ing] on his citizenship to his daughter even though a female in his position could," and "violate[d] his right to equal protection under the laws by utilizing the suspect classification of gender without justification." J.A. 6, 9-11. The amended complaint sought a declaration that petitioner is a citizen of the United States. J.A. 11-12.

The government renewed its motion to dismiss on various grounds. 4/14/93 Mot. To Dismiss 2-6. The district court held that Mr. Miller lacked "standing" because this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), had previously "reviewed the reasons underlying the distinction between mothers and fathers of children born out of wedlock, and determined that the distinction did not violate the equal protection clause of the United States Constitution." App., *infra*, 10a. The court therefore dismissed Mr. Miller as a plaintiff. *Id.* at 11a-12a. There being no remaining basis for venue in Texas, the court transferred the case to the District of Columbia, where venue was proper under 28 U.S.C. 1391(e)(1). App., *infra*, 11a-12a.

The government again moved to dismiss. 8/9/93 Mot. to Dismiss. The district court agreed with the government that under *INS* v. *Pangilinan*, 486 U.S. 875, 884 (1988), "courts do not have the power to confer citizenship in the absence of statutory authority," and that it therefore lacked any ability to redress the injury alleged by peti-

tioner. Pet. App. 31. The court accordingly granted the government's motion and dismissed the case. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-25. With respect to standing, the court reasoned that the proper inquiry is "whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted.*" *Id.* at 6-7 (quoting *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989)). Here, the court concluded (Pet. App. 7) that if the district court had held that Section 309(a)'s specific requirements for conferring citizenship on an illegitimate child of a citizen father were unconstitutional, *Pangilinan* would not have barred it from further declaring, as petitioner requested, that illegitimate children should be treated the same as legitimate children under Section 301 of the INA, 8 U.S.C. 1401, and then entering a "finding" that petitioner satisfied the requirements for citizenship set out in Section 301(g) (reprinted at App., *infra*, 3a). In the court's view, "[s]uch a finding would not have violated *Pangilinan*'s proscription on the exercise of judicial equitable power to confer U.S. citizenship in the absence of legislative authority." Pet. App. 7.

On the merits, however, the court of appeals sustained the constitutionality of Section 309(a). At the outset, the court noted that, although petitioner "claim[ed] that the statute denies equal protection by illegally distinguishing between * * * the rights of the father of an illegitimate child versus those of its mother," that claim was "based upon Mr. Miller's rights as a parent." Pet. App. 8. Because petitioner's father was not a party to the appeal, the court held that that claim was "not properly before the court." *Ibid.*

The court accordingly limited its consideration to petitioner's claims that Section 309(a) "denies equal protection by illegally distinguishing between: (a) legitimate versus illegitimate children, [and] (b) the illegitimate children of men versus those of women." Pet. App. 8; see also *id.* at 10. In addressing those claims, the court first recognized this Court's holdings that any exercise of Congress's "plenary authority to prescribe rules for the admission and exclusion of aliens" must be upheld if a court can discern any "facially legitimate and bona fide reason" to support it. *Id.* at 8-9. The court then reviewed (*id.* at 10-12) this Court's decision in *Fiallo* v. *Bell*, which upheld a provision that, like Section 309(a), required illegitimate foreign-born children claiming immigration benefits through a citizen father to provide different evidence than that required of such children claiming benefits through a citizen mother.

The court of appeals explained that *Fiallo* had mentioned two possible legitimate reasons for the statutory distinctions at issue in that case: "a perceived absence in most cases of close family ties," and "a concern with the serious problems of proof that usually lurk in paternity determinations." Pet. App. 12, quoting *Fiallo*, 430 U.S. at 799 (alteration omitted). The court remarked that "recent developments in DNA technology may have removed many of the difficulties that once plagued the proof of paternity," but it found a congressional "desire to promote early ties to this country and to those relatives who are citizens of this country" to be a rational basis for the financial support and legitimation-or-acknowledgment requirements of Sections 309(a)(3) and (4). Pet. App. 12-13. Moreover, the court found it "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father," because "[a] mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." *Id.* at 13. Indeed, the court found the requirement for such evidence "especially warranted where, as here, the applicant for citizenship was fathered by a U.S. ser-

viceman while serving a tour of duty overseas," and where she and her father "had not had an ongoing parental relationship while she was a minor." *Ibid.* Accordingly, the court saw "no basis for concluding that section [309(a)] is unconstitutional." *Ibid.*[1]

Judge Wald concurred in the judgment. Pet. App. 15-25. Although she agreed that this Court's decision in *Fiallo* was "directly on point" (*id.* at 25), Judge Wald criticized both the "facially legitimate and bona fide" standard for reviewing immigration legislation (*id.* at 17 n.2) and the use of what she regarded as outmoded or stereotype-based justifications to uphold Section 309(a). In her view, the advent of genetic testing had removed any rational or even "facially legitimate" basis for requiring citizen fathers (but not mothers) to acknowledge and agree to support such a child before adulthood as a means of preventing fraud (*id.* at 15-16, 18-20), and the use of such measures to ensure early ties to the United States rested on an impermissibly "stereotyping assumption that mothers automatically will be close to their illegitimate children whereas fathers will not" (*id.* at 20-24). Judge Wald concluded that *Fiallo*, although controlling, was "out of step with th[is] Court's current refusal to sanction 'official action that closes a door or denies opportunity to women (or to men)' based on stereotypes or 'overbroad generalizations,'" and that it "should be changed by Congress or the Supreme Court." *Id.* at 25.

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[1] The court of appeals rejected (Pet. App. 14) petitioner's argument that, because the state paternity decree obtained by her father when she was 22 years old established a parent-child relationship, for state-law purposes, retroactively to the date of her birth, she had established paternity by adjudication "while [she was] under the age of 18 years" within the meaning of Section 309(a)(4). This Court declined to review that ruling. Compare Pet. i (Question 5) with 117 S. Ct. 1689 (1997) (limiting question presented).

SUMMARY OF ARGUMENT

Section 309(a) of the Immigration and Nationality Act (INA) permits a child born abroad out of wedlock to claim United States citizenship on the basis of the child's relation to a United States citizen father, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to support the child financially until the age of 18, and (iii) before the child turns 18, he or she is legitimated under the laws of his or her residence or domicile, paternity is established by adjudication, or the father acknowledges paternity in writing under oath. Section 309(c) permits such a child to claim citizenship on the basis of relation to a citizen mother, so long as the mother was physically present in the United States, before the child's birth, for a continuous period of at least one year. Petitioner, who was born abroad out of wedlock to an alien mother, claims that she is entitled to citizenship because her father is a citizen. The State Department denied petitioner's claim on the ground that she was not legitimated or acknowledged by her putative father, or adjudicated to be his child, before she reached the age of 18.

1. Much of the argument presented by petitioner and her amici centers on an asserted constitutional right of citizen fathers to be treated identically to citizen mothers with regard to the transmission of citizenship to children born abroad. No such right is at issue in this case. Petitioner's putative father is not a party, and the only rights petitioner may assert are her own. Yet an alien outside the United States seeking naturalization has no substantive rights cognizable under the Fifth Amendment. Petitioner's claim should be rejected on that ground alone. Even if we assume, however, that some constitutional claim is properly presented, the distinctions drawn in Section 309 are fully consistent with the Constitution.

2. The principal rule of United States citizenship, now embodied in the Fourteenth Amendment, is that any child born in this country becomes a citizen at birth. Any child born abroad, on the other hand, becomes a citizen only if Congress has made some specific provision to that effect, and then only upon strict compliance with any conditions imposed by statute. Since 1790, congressional policy in this area has reflected a concern that a foreign-born child whose personal circumstances indicate no tie to the United States beyond a mere blood relationship should not automatically become a citizen of this country. That policy was strongly reiterated in the extensive consideration and enactment of the Nationality Act of 1940, which also first explicitly addressed the issue of children born abroad out of wedlock. Section 205 of that Act is the direct precursor of Section 309 of the INA.

3. This Court has always accorded extraordinary deference to Congress's legislative choices in the field of immigration and nationality. That approach to judicial review rests on the text of the Constitution and on sound considerations of national sovereignty, foreign relations, and the fundamentally political character of immigration and nationality decisions.

The distinctions drawn in Section 309 are tied to important congressional concerns. The acknowledgment and support requirements of Section 309(a) help to ensure that an illegitimate child claiming through a citizen father will have some nexus to this country that goes beyond mere biological descent, and that the child is actually comparably situated to one who claims through a citizen mother. The requirement that both conditions be fulfilled before the child reaches adulthood helps ensure that the child will not become a public charge, and provides some assurance that the father's commitments will be real and that the child's ties to the United States will develop at

the time when they are most likely to distinguish the child of a citizen from any other individual born abroad. The requirement that an illegitimate child provide clear and convincing evidence of paternity, which is not subject to any time limitation, accommodates valid concerns regarding proof of paternity. Finally, the more lenient parental residency requirement that applies to illegitimate children claiming through citizen mothers reflects not only a reasonable assumption about the likelihood of maternal custody in such cases, but a concern with reducing the risk of statelessness, which is greater in such cases than in those involving only an American father.

As the court of appeals recognized, this Court's decision in *Fiallo* v. *Bell* compels the conclusion that these distinctions are constitutional. *Fiallo* accepted as valid, in the immigration and nationality context, the considerations that paternity is more likely to be in doubt than maternity and that an illegitimate foreign-born child is more likely to have close ties to a citizen mother than to a citizen father. If anything, the few differences between this case and *Fiallo* demonstrate that the distinctions at issue here are even more clearly permissible than those at issue in that case. The arguments that petitioner and her amici advance for distinguishing or overruling *Fiallo* are unpersuasive.

4. Even if the distinctions drawn in Section 309 were unconstitutional, the appropriate remedy would not be a judicial declaration that petitioner is a citizen. The distinction challenged here is not between legitimate children, whose claims are governed by Section 301(g) of the INA, and the illegitimate children whose claims are governed by Section 309, but rather between those illegitimate children claiming under Section 309 through a citizen father and those claiming through a citizen mother. If the Court were to hold the distinctions drawn by Section

309 to be unconstitutional, any remedial measure would have to focus on that Section. If Section 309 were eliminated, Section 301(g), which was never intended to apply of its own force to illegitimate children, could not properly be expanded to authorize citizenship for petitioner. If a court sought to eliminate any inequality within the existing framework of Section 309, the exceptionally important, complicated, and permanent consequences involved would argue strongly against any judicial expansion of a provision conferring citizenship, and would suggest that the court should, instead, favor limitation or nullification of existing statutory authority in order to remedy any perceived violation of equal protection.

ARGUMENT

I. THIS CASE INVOLVES ONLY THE RIGHTS OF AN ALIEN ABROAD WHO SEEKS NATURALIZATION AS A CITIZEN OF THE UNITED STATES

This case involves a claim to United States citizenship by a young woman who was born abroad out of wedlock to an alien mother and, so far as appears, a U.S. serviceman father. Although petitioner had no parental relationship with her putative father while she was a minor (Pet. App. 13), at the age of 21 she sought recognition as an American citizen on the basis of her alleged biological descent from a citizen father. Her request was denied on the ground that she had not satisfied the requirements established by Congress in Section 309(a) of the Immigration and Nationality Act (INA) for the conferral of citizenship at birth on children born abroad out of wedlock to U.S. citizen fathers and alien mothers. In granting review, this Court limited the question presented to whether the distinction drawn in Section 309 between the illegitimate foreign-born children of citizen fathers and those of citizen mothers violates the Fifth Amendment to the United States Constitution.

Much of the argument presented by petitioner and her amici, like much of the discussion in the concurring opinion below, seems to assume that this case centers on an asserted constitutional right of citizen fathers to be treated identically to citizen mothers. We therefore think it important to note, at the outset, that that assumption is incorrect. As the court of appeals properly recognized (Pet. App. 8), petitioner's citizen father was dismissed from this case at the outset, never appealed from that decision, and is not a party to this proceeding. See also J.A. 10-11 (raising gender discrimination claim only on behalf of petitioner's father). Thus, no citizen parent's rights are properly at issue in this case. *Ibid.*[2] The only rights petitioner may assert are those of an alien outside the United States who is seeking naturalization as a citizen of this country. Yet such an alien has no substantive rights cog-

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[2] Petitioner's father was available to assert his own rights in this case, and he could have remained a party by appealing from the order dismissing him as a plaintiff. There is therefore no basis for according petitioner third-party standing to assert any rights her father might have as a citizen. See Pet. App. 8; *Ablang* v. *Reno*, 52 F.3d 801, 804 n.4 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); see also, *e.g.*, *Powers* v. *Ohio*, 499 U.S. 400, 410-411 (1991); *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); compare *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987) (children permitted to assert constitutional right of deceased parent with respect to descent of property); *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1410-1411 (9th Cir. 1993) (children permitted to assert right to transmit citizenship where citizen mothers were "deceased and [could] no longer press an equal protection claim on their own behalf"). Moreover, although the district court phrased its dismissal of Mr. Miller's suit in terms of standing, it essentially rejected his claim on the merits, applying *Fiallo* v. *Bell*. App., *infra*, 10a-11a. Petitioner would be bound by that ruling even if she had third-party standing to assert her father's rights.

nizable under the Fifth Amendment. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269-271 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770-771, 781-785 (1950); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."); *Cuban American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428-1429 (11th Cir.), cert. denied, 115 S. Ct. 2578, 116 S. Ct. 299 (1995). Petitioner's constitutional claim should be rejected, and the judgment of the court of appeals affirmed, on that ground alone.

Even if we assume, however, that petitioner may assert some constitutional claim, the only statutory distinction properly at issue in this Court is that between foreign-born illegitimate children who claim derivative citizenship through citizen mothers and those who claim it through citizen fathers. That distinction involves the type of showing that such children must make concerning the existence of some substantial relationship with the citizen parent through whom they claim.

II. SECTION 309 EMBODIES REASONABLE RULES ADOPTED BY CONGRESS SPECIFICALLY TO ADDRESS THE UNIQUE SITUATION OF ILLEGITIMATE CHILDREN BORN ABROAD

A. The Constitution Commits To Congress The Power To Specify Rules For The Naturalization Of Children Born Abroad

As this Court has long recognized, the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Under the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization."

Ibid. That principle has deep roots in the Anglo-American common law, which takes as its basic rule the *jus soli*: that citizenship derives, principally and without more, from birth within the territorial limits of the Nation.[3] It contrasts with the rule of the *jus sanguinis*, used by most civil law countries, under which nationality descends by bloodline; and it is a rule uniquely appropriate for a Nation of immigrants, whose members have, since the beginning, aspired to create a national identity associated with a new place and liberated from the old world's preoccupations with blood lineage. Questioned only once, in *Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), the principle of *jus soli* was enshrined after the Civil War in the Constitution, beyond the ordinary reach of courts and politicians. In this country there was never to be a second generation of non-citizens.

Precisely because our fundamental rule of citizenship is one of birth within this country, regardless of parentage, the situation is altogether different with respect to any child born abroad. Such a child is an alien by birth, and

> can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon

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[3] The Fourteenth Amendment also recognizes the *jus soli*'s narrow exception for persons born within a nation but not "subject to the jurisdiction thereof." In this country, that exception has been held to cover not only the traditional categories of children of foreign diplomats, those born on foreign ships, and those born to hostile occupying forces, but also the unique case of tribal Indians, who were considered to be subject, in the first instance, to the sovereign jurisdiction of their respective Tribes. See *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see also 8 U.S.C. 1401(b) (extending citizenship at birth to members of Indian Tribes).

> foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings * * * [under] the ordinary provisions of the naturalization acts.

Wong Kim Ark, 169 U.S. at 702-703.

The Constitution commits the sovereign power to "establish an uniform Rule of Naturalization" for the United States to Congress. Art. I, § 8, Cl. 4. "No alien has the slightest right to naturalization unless all statutory requirements are complied with," *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917), and "th[is] Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971). Any child born outside the United States therefore becomes a United States citizen if, but only if, Congress has made some specific statutory provision to that effect, and then only upon strict compliance with any conditions that Congress has seen fit to impose.

B. The Rules Enacted To Govern The Acquisition Of Citizenship By Children Born Abroad Are Designed To Ensure Some Real Connection Between The Child And The United States

1. *General provisions*

Congress has, over the years, adopted various different rules to govern the acquisition of citizenship by the foreign-born children of United States citizens. See generally *Bellei*, 401 U.S. at 823-826. Since 1790, however, congressional policy has consistently reflected at least two themes. The first is that the foreign-born children of citizens should in some circumstances be granted United States citizenship. The second, by contrast, is a concern that a foreign-born child related by blood to a citizen but lacking any personal tie to the United States—its territory, its culture, or its institutions—should not automatically become a citizen. That concern has found expression in different ways, including in requirements that a citizen parent have resided in this country before the birth of a child abroad and that the child reside in the United States for some significant period before reaching a certain age. *Ibid.*

The first congressional enactment relating to foreign-born children provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. The proviso served to ensure that, just as generations of children born in this country were not to remain "aliens" simply because they descended from alien parents, so too generations of children born abroad were not to become "citizens" by virtue of a mere blood relationship, unaccompanied by any other tie to this country. That principle has persisted through the years. See *Bellei*, 401 U.S. at 823-824 (describing history).

In 1933, President Roosevelt directed the Secretary of State, the Secretary of Labor (who then had jurisdiction over the Immigration and Naturalization Service), and the Attorney General "to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress." *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Sess., Pt. 1, at V (House Comm. on Immigration and Naturalization 1939) (the Proposed Code). That committee produced a proposed new nationality code, extensively annotated with explanatory comments, which the President submitted to Congress in 1938 (*ibid.*) and

which formed the basis for the Nationality Act of 1940, ch. 876, 54 Stat 1137.

"The problem of the child born abroad to parents of different nationalities was the subject of extended consideration" in developing the new draft nationality code. Proposed Code VI. The drafters noted, for example, that "[t]he problem of acquisition of citizenship *jure sanguinis* ha[d] been a subject of considerable discussion in recent years," with proposals ranging from simply allowing foreign-born children of citizen mothers, like those of citizen fathers, to become citizens at birth (which was not the general rule until 1934; see note 7, *infra*) to abolishing the principle of blood transmission altogether. *Id.* at 9-10. After discussing the issue at some length (see, *e.g.*, *id.* at 8-11, 13-14), the drafting committee, "fully intending that its proposal should carry out the principle of equality between men and women in the matter of nationality" (*id.* at 10-11), chose to balance competing concerns by dealing separately with various potential circumstances of birth abroad, and allowing those circumstances to determine the degree to which it was desirable to require indications of connection to the United States beyond the simple fact of blood descent.

The drafters noted, for example, that in the "great majority" of foreign-birth cases, "husband and wife [were] both citizens of the United States," and that "[i]n such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character." Proposed Code 11. Section 201(c) of the draft (*id.* at 8), which became Section 201(c) of the Nationality Act (54 Stat. 1138) and is now Section 301(c) of the INA (App., *infra*, 2a), therefore confers citizenship on any child born abroad to a citizen couple, retaining only the requirement that at least one parent have previously "had a

residence in the United States." The latter restriction "seem[ed] quite desirable, since it would not be a wise policy to extend citizenship indefinitely to generations of persons born and residing in foreign countries." Proposed Code 11.

Conferring citizenship at birth on the foreign-born children of mixed-citizenship couples presented, in the drafters' view, "greater difficulties," and "require[d] correspondingly stricter limitations." Proposed Code 11. In that context, the drafters proposed that citizenship be conferred only if the citizen parent had resided in the United States for at least ten years before the child's birth abroad, and generally subject to the condition that the child reside in the United States for at least five years between the ages of 13 and 21, and take an oath of allegiance within six months after turning 21. *Id.* at 13-14.[4] After extensive consideration in committee, Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the 1940 Act.[5] The residency requirements applicable to both

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[4] The Proposed Code explained (at 14) that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." The residency requirement for retention of citizenship by the child was not to apply if the citizen parent was working abroad for the United States government or certain American institutions, on the theory that such parents were likely to "retain their American sympathies and character" and to "bring up their children as Americans." *Ibid.*

[5] 54 Stat. 1139. See H.R. Conf. Rep. No. 3019, 76th Cong., 3d Sess. (1940); S. Rep. No. 2263, 76th Cong., 3d Sess. 4 (1940); H.R. Rep. No. 2396, 76th Cong., 3d Sess. (1940); *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 28-29, 35-42, 44-50, 57-61, 207-209, 241-242, 259, 297-301, 333-335, 362 (printed 1945) [*1940 Hearings*].

parents and children have been progressively reduced over the years, but the same basic provision remains in force today as Section 301(g) of the INA (App., *infra*, 3a).[6]

2. *Provisions with respect to illegitimate children*

We have discussed the history of these general provisions in some detail because it is important to understand the degree to which Congress has always been concerned, and certainly the degree to which it was concerned in 1940, that United States citizenship not be conferred automatically on a child born abroad unless there is some reason to believe that he or she has a more genuine and substantial connection to the United States than that provided by mere blood relationship to one citizen parent. That point is of considerable relevance to the present case.

Before the Nationality Act of 1940, the relevant statutory provision (Section 1993 of the Revised Statutes of 1874) did not deal specifically with the issue of illegitimate children.[7] Section 1993 was administratively interpreted

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[6] Congress has varied the applicable residency requirements considerably over time. See Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139 (ten years' U.S. residence, at least five after age 16, for parent, and five years' U.S. residence between ages 13 and 21 for child); Immigration and Nationality Act, ch. 477, § 301(a)(7) and (b), 66 Stat. 236 (1952) (ten years, at least five after age 14, for parent, and five years between ages 14 and 28 for child); Act of Oct. 27, 1972, Pub. L. No. 92-584, § 1, 86 Stat. 1289 (same for parent, two years between ages 14 and 28 for child); Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046 (same for parent, none for child); Immigration and Nationality Act Amendments of 1986 (INAA), Pub. L. No. 99-653, § 12, 100 Stat. 3657 (five years, at least two after age 14, for parent, none for child).

[7] Section 1993 originally referred to "[a]ll children * * * born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof." As amended in 1934 (Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797), Section 1993 referred to any such child "whose father or mother or both * * * is a

to apply to such a child claiming through a citizen father if the child was later legitimated, by marriage of the father to the child's mother or otherwise, in accordance with the laws of the father's domicile. See Proposed Code 17-18; 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). In the case of an illegitimate child claiming through a citizen mother, the State Department for some years interpreted Section 1993 to permit acquisition of citizenship if the identity of the child's father had not been legally established by legitimation or adjudication (on the ground, before 1934, that the mother in such cases stood in the position of the father). Proposed Code 18. The Attorney General, however, rejected that view, at least with respect to children born before 1934. 39 Op. Att'y Gen. 290 and 397 (1939).

The 1940 Act, following the recommendation of the Proposed Code (at 17-18), for the first time explicitly addressed the issue of children born abroad out of wedlock. Section 205 of that Act provided that Sections 201(c) and (g), among others, should apply to a child born out of wedlock, "provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139. In the absence of legitimation or adjudication, Section 205 provided that such a child could acquire United States nationality through a citizen mother, so long as the mother "had previously resided in the United States." *Id.* at 1140.[8] Those provisions were somewhat re-

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citizen." See *Bellei*, 401 U.S. at 824. Congress recently provided for retroactive application of the 1934 amendment. See 8 U.S.C. 1401(h).

[8] See also committee reports cited at note 5, *supra*; *1940 Hearings* 3, 43, 62-63, 207-209, 302.

vised and reenacted in 1952 as Sections 309(a) and (c) of the INA.[9]

In 1986, responding in large part to the State Department's request to reduce the administrative burdens involved in ascertaining paternal domiciles and keeping track of widely variant requirements for formal legitimation, Congress amended Section 309(a) to simplify its application in many cases.[10] The present version of Section 309(a) (App., *infra*, 4a) provides that the rules applicable, under Section 301(g), to the foreign-born child of a citizen who is married to an alien shall also apply to the illegitimate child of a citizen father and an alien mother, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to support the child financially until the age of 18, and (iii) before the child turns 18, he or she is legitimated under the laws of his or her residence or domicile, paternity is established by adjudication, or the father acknowledges paternity in writing under oath.[11]

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[9] 66 Stat. 238-239. See also H.R. Conf. Rep. No. 2096, 82d Cong., 2d Sess. (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 1-3, 39 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 24-28, 76, 241 (1952).

[10] INAA § 13, 100 Stat. 3657; see also *Administration of the Immigration and Nationality Laws: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 118-120, 150 (1986) [*1986 Hearing*]. Congress revised the format of Section 309(a), without substantive change, in the Immigration Technical Corrections Act of 1988 (ITCA), Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

[11] Petitioner falls within a transition rule that allows her to select application of Section 309(a) either as amended in 1986 or before the amendment (when it required that paternity be "established while such child is under the age of twenty-one years by legitimation," 8 U.S.C. 1409(a) (1982)). See INAA § 23(e)(3), as added by ITCA § 8(r), 102 Stat. 2619. We are not aware that petitioner has made an election under that rule. We address the new provision, which is of more general interest.

The 1986 amendments did not change Section 309(c), which continues to provide that a child born abroad out of wedlock "shall be held to have acquired at birth the nationality status of his mother, * * * if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

III. THE RULES FOR NATURALIZATION AT BIRTH ESTABLISHED BY SECTION 309 ARE FULLY CONSISTENT WITH THE CONSTITUTION

A. Congressional Choices In The Field Of Immigration And Nationality Are Entitled To Extraordinary Deference

Every federal statute is entitled to a presumption of constitutionality, and, under any circumstances, "[j]udging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). In the special context of legislation concerning immigration and nationality, however, this Court has particularly "underscore[d] the limited scope of judicial inquiry." *Fiallo*, 430 U.S. at 792. Indeed, the Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Ibid.*, quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909); see also, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 79-82 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) ("As to the extent of the power of Congress under review, there is not merely 'a page of history,' * * * but a whole volume."); *Harisiades* v. *Shaughnessy*, 342 U.S. 580,

588-589 (1952); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711-713 (1893).

Deferential review of legislation concerning immigration and nationality is not a relic of the legal past. It rests, first, upon the Constitution's textual commitment to Congress of the power "[t]o establish an uniform Rule of Naturalization * * * throughout the United States." Art. I, § 8, Cl. 4. That commitment, in turn, rests on the basic principle that the power to admit or exclude aliens, including the powers to prescribe conditions for their entry or continued presence and to specify whether and how persons not born in this country may become citizens, is a necessary and inherent attribute of national sovereignty. See, *e.g.*, *Fiallo*, 430 U.S. at 792; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953). Moreover, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades*, 342 U.S. at 588-589. The development and implementation of those policies are necessarily committed exclusively to the political Branches, in part because they often depend on an evaluation of, and adaptation to, circumstances and policies in foreign lands, and therefore lie beyond the institutional competence of the judiciary.

Finally, policies toward the admission to this country, and most especially to full citizenship therein, of those not born here are uniquely political in character, dealing as they do with the threshold question of who is entitled to any share in the benefits, protections, and responsibilities of the democratic compact that the Constitution represents. See, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265-266.[12]

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[12] See also 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 237 (1966) (remarks of Gouverneur Morris) ("every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted").

That compact is in some respects a social contract, but it was never intended, and has never been interpreted, to confer rights on all the world as third-party beneficiaries. See *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring) ("It is not for this Court to reshape a world order based on politically sovereign States."); compare *Verdugo-Urquidez*, 494 U.S. at 270-275. The judiciary has an unquestioned role in protecting rights accorded to citizens and legal residents of this country under the Constitution, and, at least where so provided by Congress, in ensuring that the procedures used to implement Congress's substantive policy decisions with respect to immigration and nationality are fair. Those substantive decisions themselves, however, involve the exercise of sovereign rights, fundamentally democratic and majoritarian in nature, and reflect "political polic[ies], belonging to the political branch of the Government [and] wholly outside the concern and the competence of the Judiciary." *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring); see also *Galvan*, 347 U.S. at 531-532.

It is for these basic reasons, as cogent now as they have always been, that the principle of deference to congressional decisions concerning immigration and naturalization "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 792 n.4, quoting *Galvan*, 347 U.S. at 531. The Court has steadfastly declined to retreat from that principle, despite repeated invitations to do so. *Fiallo*, 430 U.S. at 792 n.4; *Mandel*, 408 U.S. at 767; *Galvan*, 347 U.S. at 530-532. There is no reason to adopt any different approach in this case.

B. The Distinctions Drawn In Section 309 Are Tied To Legitimate Congressional Concerns

The Court's order granting review in this case poses the question whether the distinctions drawn in Section

309 between the illegitimate foreign-born children of citizen fathers and those of citizen mothers violate the Fifth Amendment. 117 S. Ct. 1689. In considering that question, it is necessary both to delineate what distinctions Section 309 actually draws, and to consider Congress's purposes in drawing them. In this case, adjudication of petitioner's application for registration as a citizen progressed only far enough for the Department of State to conclude that she had not demonstrated that her putative father had legitimated or acknowledged her before the age of 18 (see Pet. App. 33-34), and the validity of that requirement is all that is strictly at issue in this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, for judicial review of the Department's decision. See J.A. 7. For the sake of completeness, however, we shall address the other features of Section 309 as well.

1. *Acknowledgment and financial support*

As amended in 1986, Sections 309(a)(3) and (4) require that a child born abroad out of wedlock who claims citizenship through a citizen father establish both that the father has legitimated, formally acknowledged, or been adjudged the father of the child, and that he has agreed in writing to provide financial support during the child's minority. To some extent, those requirements serve, as did the sole option of legal legitimation under prior law, to address "the serious problems of proof that usually lurk in paternity determinations." *Fiallo*, 430 U.S. at 799. More significantly, however, they help to ensure both that such a child has some genuine tie to the United States, and that he or she is in a position roughly equivalent to that of the typical foreign-born child claiming through an unmarried citizen mother. A mother has an established legal relationship with her child from the moment of birth; and, like any parent, she will normally be legally responsible for the child's support during minority. See, *e.g.*, Tex. Fam. Code

Ann. §§ 151.001(a) ("The parent-child relationship may be established between a child and: (1) the biological mother by proof of her having given birth to the child."), 151.003 (parental duty to support) (West 1996). Moreover, because an illegitimate child typically remains in the custody of the mother (as did petitioner in this case), enforcement of that financial obligation is generally not a significant issue. And, if such a child came to the United States with his or her mother, there would be no question of a State's ability to enforce the mother's support obligations.

The same legal obligations rest on the father of a child born out of wedlock only if paternity has been legally established. See, *e.g.*, Tex. Fam. Code Ann. § 151.001(a) (West 1996) (parent-child relationship with father to be established "as provided by this code"). Unfortunately, both history and contemporary experience demonstrate the frequent difficulty, even in the purely domestic context, of establishing and enforcing that obligation in the frequent instances in which the father is absent or unwilling. See generally, *e.g.*, *Blessing* v. *Freestone*, 117 S. Ct. 1353 (1997) (discussing extensive federal requirements addressed to establishing paternity and enforcing child-support obligations); S. Rep. No. 1356, 93d Cong., 2d Sess. 42 (1974) (new federal requirements would "help children attain th[e] right [to paternal support], including the right to have their fathers identified so that support can be obtained"). When Congress liberalized Section 309(a) in 1986 to allow a child claiming citizenship to show only that a citizen father had acknowledged paternity in writing under oath, there was justifiable concern that relaxation of the previous legal legitimation requirement might make it more difficult to seek or obtain enforcement of the father's financial obligations in the United States.[13] The

[13] See *1986 Hearing* 150 (statement of Asst. Sec'y of State for Consular Affairs) ("The purpose of this clause is to facilitate the

written agreement addresses that concern, and also provides for support in situations in which the child remains abroad (presumably with an alien mother) in a jurisdiction where paternal support obligations might not otherwise extend or be enforceable. While the acknowledgment and written support agreement required by Sections 309(a)(3) and (4) may be no more effective a guarantee of support than are the mother's pre-existing legal relationship and obligations, requiring them from a foreign-born illegitimate child who claims citizenship through a citizen father helps, again, to ensure that the child has a nexus to a citizen parent (and therefore to this country) that goes beyond mere biological descent, and that the child is actually comparably situated to one claiming through a citizen mother, who would be subject to the legal enforcement of parental obligations. Compare *Lehr* v. *Robertson*, 463 U.S. 248, 259-268 (1983); *Quilloin* v. *Walcott*, 434 U.S. 246, 256 (1978).

2. *Acknowledgment or legitimation by age 18*

Section 309(a)(4) requires a showing that a citizen father legitimated or acknowledged the child claiming citizenship while the child was under the age of 18. Because Section 309(c) does not require explicit acknowledgment by a citizen mother (whose legal relationship to the child is sufficiently established at birth), it includes no comparable deadline.

It is important to note that the provision for acknowledgment in Section 309(a)(4) is separate from proof of blood relationship. While the threshold need for such proof was previously subsumed under the requirement that "paternity * * * [be] established while [the] child is under the

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enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states."); see also *id.* at 144.

age of twenty-one years by legitimation" (8 U.S.C. 1409(a) (1982)), Congress's 1986 revision provides for proof of biological paternity in Section 309(a)(1), without imposing any limitation other than that the proof be clear and convincing.[14] The time limit for meeting the legitimation-or-acknowledgment requirement of Section 309(a)(4) must therefore reflect, at least in part, some other congressional concern.

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[14] For that reason, arguments concerning recent developments in genetic testing (see Pet. Br. 18-19; Pet. App. 18 (opinion of Wald, J.)) are beside the point. The State Department has never required such testing, or less reliable forms of blood testing that have been available for some time, in determining biological paternity, in part because it is expensive and often unavailable overseas. See 7 United States Dep't of State, *Foreign Affairs Manual* 1131.5-4(c). On the other hand, the Department has never declined to recognize such testing, if performed by a competent and trustworthy laboratory, as acceptable evidence of biological paternity. *Ibid.* Moreover, although the concurring opinion below emphasizes Congress's recognition of genetic testing as a reason for eliminating "arbitrary time limitations" for proving paternity in the context of toughened efforts to collect child support from unwed fathers in this country (Pet. App. 19), we note that such determinations are generally limited to the period of the child's minority, which coincides with (i) the period in which a father is normally required by law to support his child, (ii) the period in which the immigration laws typically allow a child to derive naturalization or immigration benefits from his or her parents (see note 15, *infra*), and (iii) the time limits for financial support and for formal legitimation or acknowledgment imposed by Sections 309(a)(3) and (4). Compare 42 U.S.C. 666(a)(5), as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 331, 110 Stat. 2227-2230 (requiring States, as a condition of receiving federal child support enforcement funds, to permit establishment of paternity at any time before the child reaches 18 years of age and to provide other procedures for acknowledging or proving paternity); H.R. Rep. No. 527, 98th Cong., 1st Sess. 38 (1983); *Clark* v. *Jeter*, 486 U.S. 456, 460 (1988) (discussing 42 U.S.C. 666(a)(5) and invalidating six-year statute of limitations on paternity actions).

We think that concern is the longstanding one discussed at length above: that citizenship not devolve automatically on a foreign-born child who is unlikely to develop, in his or her formative years, substantial personal ties to the United States. Compare *Lehr*, 463 U.S. at 266-267. As the court of appeals recognized (Pet. App. 10), the acknowledgment requirement is calculated to help ensure the existence not only of a biological relation but also of some personal relationship between an illegitimate foreign-born child and the father through whom he or she seeks to derive citizenship. Insisting that that requirement, and the financial support requirement of Section 309(a)(3), be met before the child has reached adulthood helps in part to ensure that the child will not become a public charge. In addition, however, it provides some assurance that the father's commitments to the child will be real, not formulaic, and that the child's ties to his or her citizen parent, and therefore to the United States, will at least begin to develop during childhood, when they are most likely to take deep root and to meaningfully distinguish the foreign-born child of a citizen from any other individual born abroad who ultimately decides, as an adult, that he or she would like to immigrate to the United States.[15]

That Congress has spelled these particular requirements out in connection with claims to citizenship by the illegitimate children only of citizen fathers, not citizen mothers, reflects nothing more than the reality that a

[15] In a related context, a foreign-born child who does not become a citizen at birth is entitled, under certain circumstances, to derivative naturalization if one or both of his parents is naturalized—but only if the naturalization occurs before the child turns 18. See 8 U.S.C. 1431-1432. After that age, regardless of other circumstances, the child is treated as an adult alien, who must meet all of the requirements for naturalization on his or her own behalf. See also 8 U.S.C. 1101(b)(1), 1153(d).

child born abroad to an unmarried American mother has an established legal relationship with a citizen parent at birth, and is sufficiently likely also to have a substantial personal relationship that there is no need to require further evidence of early and significant ties to this country. In the case of illegitimate foreign-born children of American fathers, on the other hand, there is no such established legal relationship at birth, and Congress could reasonably have expected that the usual scenario would bear a much greater resemblance to—for example—the facts of this case.[16] In these respects, as this Court has said in a different context (*Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975)), "the different treatment of [the children of] men and women * * * reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female * * * [citizen parents] are *not* similarly situated with respect to" their immediate and likely ongoing relationship with a child born to them and an alien partner, overseas and out of wedlock.

This Court has recognized, in a case with facts in some ways strikingly similar to this one (although in the domestic context), that the mothers and fathers of children born out of wedlock may not be similarly situated for purposes of constitutional analysis. In *Lehr* v. *Robertson*, the Court refused to hold that a child's natural father had

[16] An American man, overseas briefly on temporary military duty, has an affair of unclear origin, duration or substance with an alien woman. Having allegedly fathered a child, who remains with her mother, he returns home, developing no parent-child relationship with his putative daughter during her minority. Twenty-one years later, the child, having lived all her life with her mother and having been raised entirely abroad, applies for recognition as a United States citizen, on the basis of a bare biological relationship—buttressed only slightly, in this case, by her father's willingness to sign papers that at this point involve no financial commitment and have, at best, highly uncertain emotional or personal significance.

an absolute right to prior notice of adoption proceedings to safeguard his "inchoate relationship with a child whom he ha[d] never supported and rarely seen in the two years since her birth." 463 U.S. at 249-250. Quoting with approval Justice Stewart's observation that "[p]arental rights do not spring full-blown from the biological connection between parent and child," but "require relationships more enduring" (*id.* at 260), the Court made clear that "the mere existence of a biological link does not merit * * * constitutional protection" equivalent to that accorded to true family relationships (*id.* at 261 & n.17). Thus, "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion" (*id.* at 266); and in a case in which "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights" (*id.* at 267-268; footnote omitted).

The father and mother of an illegitimate child are differently situated not only with respect to proof of their biological relationship with the child, but also with respect to the very nature of that relationship from its inception. Cf. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 895-898 (1992); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 69-71 (1976). Moreover, in this case, as in *Lehr*, petitioner's mother and her putative father have little in common in terms of their legal relationship to her during her childhood, the parental responsibilities that they actually assumed, and the family relationships that in fact developed. Compare, *e.g.*, Pet. App. 13 (petitioner had no parental relationship with her father) with J.A. 18-24 (detailing petitioner's family history in the Philippines). In the context of Section 309, that factual pattern is not only typical, but highly relevant to the congressional concern with

whether an illegitimate foreign-born child claiming citizenship has ever enjoyed any substantial familial relationship with his or her citizen father during his or her formative years. As in *Lehr*, Congress is not constitutionally required to ignore real differences in the situation of citizen mothers and fathers in framing rules for the conferral of nationality at birth.

Also as in *Lehr*, the congressional scheme here is not "likely to omit many responsible fathers" (463 U.S. at 264), because Section 309(a) allows any citizen father who is aware that he has fathered a child abroad out of wedlock, and is willing to embrace the joys and burdens of parenthood, to take simple steps to substantiate that relationship and, in so doing, to transmit his American citizenship. Where, however, a citizen father has neither acknowledged nor supported such a child at any time during the child's minority, Congress has made a reasonable judgment that the child is not sufficiently likely to have developed early and substantial family ties to the United States to justify an automatic grant of citizenship on the basis of a biological relationship alone. Compare *Lehr*, 463 U.S. at 259-268.

3. *Clear and convincing evidence of blood relationship*

As we have noted, Section 309(a)(1) requires a child claiming through a putative citizen father to establish the alleged blood relationship by "clear and convincing" evidence—a requirement not imposed, in those terms, on a child claiming through a citizen mother under Section 309(c). A child claiming under Section 309(c) must, however, establish maternity, just as a child claiming under Section 309(a) must establish paternity. The proof offered will usually be a birth certificate or other local birth record; and for purposes of establishing a blood relationship with the mother, such a record will normally be clear and convincing evidence. If there is any doubt on that score,

the State Department will investigate and require whatever further evidence it deems necessary. See, *e.g.*, 7 United States Dep't of State, *Foreign Affairs Manual* 1131.4, 1131.5-4(b)-(c), 1133.6 (rev. 12/31/84). There is therefore little practical difference in the proof of blood relationship required under either provision. The fact that Section 309(a)(1) spells out a specific standard of proof simply reflects the fact that serious doubts concerning biological paternity are common, while similar doubts concerning biological maternity are rare. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347, 355 & n.7 (1979) (plurality opinion); *Lalli* v. *Lalli*, 439 U.S. 259, 268-269 (1978) (plurality opinion).

4. *Parental residency*

Because Section 309(a) refers back to the requirements applicable, under Section 301(g), to the children of married couples, an illegitimate child whose mother is not a citizen will not acquire citizenship from his or her father under Section 309(a) unless the father meets the residency requirement set out in Section 301(g) (presently five years, at least two of them after attaining the age of 14). An illegitimate child claiming through a citizen mother under Section 309(c), on the other hand, need only show that the mother was "physically present in the United States * * * for a continuous period of one year" at some point before the child's birth.

We note, first, that the transmission requirement applicable to citizen fathers under Section 309(a) applies by cross-reference, and is the same as that applicable under Section 301(g) to a citizen father or mother who has a child overseas while married to a spouse who is not a citizen. Thus, Section 309(a) does not impose on illegitimate children born overseas to citizen fathers a parental transmission requirement more onerous than the norm; rather, Section 309(c) applies a special, unusually generous rule to

the children of citizen mothers who give birth abroad and out of wedlock.

The Proposed Code submitted to Congress in 1938 suggests two possible reasons for this distinction. First, the drafters' commentary indicates the expectation that a citizen mother would likely have custody of any child born abroad out of wedlock. Proposed Code 18; compare *Quilloin*, 434 U.S. at 249 & n.5; *Lalli*, 439 U.S. at 268.[17] Because, in such a situation, the child would likely be raised primarily by his or her one citizen parent, the situation would be similar, in terms of likely American acculturation, to that of a child living abroad with parents both of whom were citizens, and there would be little reason to require any more than the minimal prior parental residence required in the case of married citizen couples.

Second, the Proposed Code reveals a concern with coordinating American law with that of other countries in this area. The drafters noted (Proposed Code 18) that "the laws of some thirty foreign countries contain provisions for the nationality of illegitimate children, * * * and in all but Turkey such children follow the mother's nationality in the absence of any act legally establishing [paternal] filiation." Thus, the illegitimate child of a United States citizen mother and a foreign father—unlike the illegitimate child of an American father and a foreign mother—might well not be recognized as a citizen or national by the country where the child was born (or the country of which the father was a citizen).[18] Congress therefore had good

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[17] Compare, *e.g.*, United States Dep't of Commerce, Bureau of the Census, *Current Population Reports*, No. P20-48, "Household and Family Characteristics: March 1995," at 5 (mother-child families accounted for 85% of single-parent households with minor children).

[18] We are informed by the Department of State that it has consulted, in connection with this case, with consular officers in six nations in which the United States has or has had a significant military pres-

reason to provide a special rule for transmission of American citizenship to the children of citizen mothers, in order to harmonize United States law with relevant foreign laws on this issue and to minimize the potential problem of statelessness that might otherwise arise. See also S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (Section 309(c) "insures that the child shall have a nationality at birth").

C. Section 309 Is Constitutional Under *Fiallo* v. *Bell*

As we have explained, the nationality provisions of Section 309, including its limited distinctions between the illegitimate children of citizen mothers and those of citizen fathers, are entitled to exceptional deference from this Court. In *Fiallo* v. *Bell* and *Kleindienst* v. *Mandel*, the Court held that an exercise of the immigration and naturalization power would be upheld so long as it was based on "a facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794, quoting *Mandel*, 408 U.S. at 770; see also *Diaz*, 426 U.S. at 83 (upholding classification affecting aliens as not "wholly irrational").[19]

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ence and which, not coincidentally, account for a large proportion of citizenship claims by illegitimate children born abroad. The Department reports that the problem of foreign law identified in the text remains a clear concern today in at least Germany, Great Britain, South Korea and Vietnam. Recent legal changes in the Philippines and Thailand have allowed an illegitimate child born there of a non-national mother to acquire Philippine or Thai nationality, respectively, if the father is a Philippine or Thai national and complies with the requirements of local law. The possibility of statelessness remains, however, in all other cases, unless the mother can transmit her citizenship in accordance with the law of her own country.

[19] In our view, the "facially legitimate" standard applied in immigration and nationality cases is more deferential even than the familiar "rational basis" standard applied in the context of purely domestic legislation. But see *Ablang*, 52 F.3d at 804, citing *Wauchope*, 985 F.2d at 1414 n.3; *Azizi* v. *Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

Fiallo involved a challenge to Section 101(b) of the INA, 8 U.S.C. 1101(b) (1976), a definitional provision that had the effect of granting preferential immigration status to certain children (under the age of 21) and parents of United States citizens. See 430 U.S. at 788. In the case of children born out of wedlock, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the age of 18 and while in the legal custody of the father. *Id.* at 788-789 & n.1. That distinction was challenged on the ground that it represented "'double-barreled' discrimination based on sex and illegitimacy, infringed upon the due process rights of citizens and legal permanent residents, [and] implicated 'the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship.'" *Id.* at 794.

In rejecting those arguments, the Court recognized that the challenged distinction was "just one of many drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions." 430 U.S. at 797. After "underscor[ing] the limited scope of judicial inquiry into immigration legislation" (*id.* at 792), and emphasizing that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision" (*id.* at 799), the Court deferred to Congress's "obvious[] * * * determin[ation] that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems

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The difference is not critical here because, for the reasons stated, the distinctions drawn by Section 309 are plainly rational. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319-321 (1993) (discussing "rational basis" standard).

of proof that usually lurk in paternity determinations" (*ibid.*). Noting that "[t]he inherent difficulty of determining the paternity of an illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier" (*id.* at 799 n.8), the Court acknowledged that "there are widely varying relationships and degrees of kinship," and that in "the inevitable process of 'line drawing'" it was "appropriate for Congress to consider not only the nature of these relationships but also problems of identification, administration, and the potential for fraud" (*id.* at 795 n.6). In response to the contention that the provision was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children," and that existing administrative procedures "could easily handle the problems of proof involved," the Court "simply note[d] that this argument should be addressed to the Congress rather than the courts." *Id.* at 799 n.9.

As the court of appeals recognized, the Court's analysis in *Fiallo* compels the conclusion that Section 309 is constitutional. Pet. App. 10-14; see also *Ablang* v. *Reno*, 52 F.3d 801, 805-806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). The congressional concerns accepted as valid by the Court in *Fiallo*—that paternity is more likely to be in doubt, and may be more difficult to prove, than maternity, and the greater likelihood that an illegitimate foreign-born child would develop early and close ties to a citizen mother as opposed to a citizen father—also animate, as we have explained, the distinctions drawn by Congress in the treatment of children who claim citizenship through citizen fathers under Section 309(a) and those who claim through citizen mothers under Section 309(c). Indeed, those distinctions are, if anything, even more clearly permissible than the ones at issue in *Fiallo*.

First, the reasonableness of the distinctions in Section 309 depends somewhat less on the difficulties inherent in proof of paternity, because Section 309(a)(1) merely requires that paternity be proved by any acceptable "clear and convincing evidence." As we have explained, that requirement does little more than place biological paternity, as a statutory criterion, on roughly the same footing as biological maternity, which must be established in order to claim citizenship under Section 309(c), but which will seldom be in doubt and will normally be proven clearly and convincingly by local records incident to the birth.

Second, after Congress's liberalization of Section 309(a) in 1986, the establishment of a personal or legal relationship indicative of ties to the United States no longer requires formal legal legitimation, as did both former Section 309(a) and the provision at issue in *Fiallo*. Rather, under amended Sections 309(a)(3) and (4)(B), an illegitimate foreign-born child who claims citizenship through his or her father need only show that the father acknowledged paternity, in writing and under oath, before the child turned 18, and agreed in writing to provide financial support while the child remained a minor. Any argument that Section 309(a) impermissibly ignores or impedes the possibility of responsible fatherhood is therefore even less persuasive than were the similar arguments advanced and rejected in *Fiallo*.

Third, *Fiallo* involved a direct assertion of the rights of American citizens. See 430 U.S. at 794-795 & n.6. In this case, by contrast, petitioner's father is not before the Court, and the only rights petitioner may assert are her own. See pages 10-12 & note 2, *supra*. As this Court has made clear, however, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *Ginsberg*, 243 U.S. at 475. Although the Court has never adopted a rule of complete non-

reviewability in this area (see *Fiallo*, 430 U.S. at 793 n.5), the absence of any citizen party to this case makes petitioner's challenge to Congress's choices in framing Section 309 far weaker even than the challenge at issue in *Fiallo*.[20]

For all these reasons, the court of appeals correctly held that Section 309 must be sustained under *Fiallo*. Petitioner cannot plausibly contend either that the provisions of Section 309 are facially illegitimate, or that they were not adopted in good faith. Her constitutional challenge must therefore fail.

D. Petitioner's Arguments For Distinguishing Or Overruling *Fiallo* Are Unpersuasive

1. Petitioner (Br. 9-10) and her amici (Br. 18-20) are wrong to suggest that this case should be subject to a more stringent standard of constitutional review than that applied in *Fiallo* because this case involves Congress's choices in conferring citizenship on children born abroad, rather than their admission as permanent residents. As we have explained (see pages 12-14, *supra*), while almost

[20] As *Fiallo* held (430 U.S. at 794-795 & n.6.), even the involvement of citizens' rights would not substantially lessen the degree of deference the Court owes to congressional choices in the area of immigration and nationality. That deference ultimately rests in significant part on the nature of the legislative power exercised (see pages 21-23, *supra*), as well as on the fact that those most directly affected are generally aliens abroad who have no substantive rights under the Constitution. Moreover, as the Court recognized in rejecting a First Amendment claim in *Kleindienst* v. *Mandel*, the argument that enhanced review is appropriate whenever citizens' rights are affected "would prove too much," because there will be some such effect "[i]n almost every instance." 408 U.S. at 768. Certainly that is true of derivative citizenship claims, which will, by definition, involve at least a putative interest of at least one citizen parent. Recognizing such an "exception" would vitiate the rule of deference in the context of acquisition of nationality through birth abroad.

all persons born within the United States have a constitutional right to citizenship under the Fourteenth Amendment, any person born outside the country, regardless of parentage, may become a citizen only through the exercise of Congress's plenary power over naturalization. *Bellei*, 401 U.S. at 827-828; *Wong Kim Ark*, 169 U.S. at 701-703. That power is not fundamentally different when it is exercised "by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens," than when it is used to prescribe rules "enabling foreigners individually to become citizens by proceedings * * * [under the] ordinary provisions of the naturalization acts," and its exercise is entitled in either case to the same deferential standard of review. *Id.* at 703.[21]

2. None of the cases cited by petitioner or her amici calls into question *Fiallo*'s deferential approach to questions of immigration and nationality. Petitioner, for example, relies (Br. 12-14) on this Court's decisions in *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Plyler* v. *Doe*, 457 U.S. 202 (1982). In *Trimble*, the Court struck down a state intestate succession statute on the ground that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." 430 U.S. at 772. Given the ease with which a willing father may ac-

[21] See also *Ablang*, 52 F.3d at 805-806; *Wauchope*, 985 F.2d at 1414; *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990); *Villanueva-Jurado* v. *INS*, 482 F.2d 886, 887 (5th Cir. 1973) ("Congress has a completely free hand in defining citizenship as it relates to persons born abroad."). Petitioner relies (Br. 9-10) on dictum in *Wauchope*, but that case actually followed *Runnett* in applying the "facially legitimate and bona fide" standard articulated by this Court in *Fiallo*. Petitioner cites no holding by this Court or any court of appeals to the contrary, and we are aware of none.

knowledge his child under Section 309(a), thus ensuring the transmission of his citizenship, this case involves nothing like the flat bar at issue in *Trimble*. Even if it did, however, *Fiallo*, decided on the same day, explicitly distinguished *Trimble* on the ground that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." 430 U.S. at 799 n.6, quoting *Trimble*, 430 U.S. at 772. Indeed, *Fiallo* reiterated that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792.

Plyler, too, expressly reaffirmed the principle of deference to congressional decisions concerning "the character of the relationship between [an] alien and this country." 457 U.S. at 225. The Court specifically recognized "the federal prerogative to control access to the United States, * * * the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation," and the judiciary's "unusual deference" to Congress's "delicate policy judgments" with respect to "admission to our Nation and status within our borders." *Id.* at 219 n.19, 225. After pointing out (*ibid.*) that the States enjoy no similar power, the Court held only that a State could not deny an education to the children of aliens within its jurisdiction, whether or not they were lawfully present under federal law, unless it could show a substantial governmental interest in so doing. *Id.* at 230.

Petitioner's amici cite (Br. 13-18) *Landon* v. *Plasencia*, 459 U.S. 21 (1982), and *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). In *Landon*, the Court cited both *Fiallo* and *Kleindienst* in setting out, once again, the general principle of deference to Congress's exercise of the "sovereign prerogative" to admit or exclude aliens. 459 U.S. at 32. The Court went on to hold only that a permanent resident alien

who had been absent from the country for "only a few days" (*id.* at 34) was entitled to due process in her exclusion hearing, because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly" (*id.* at 32). Nothing in our submission in this case is inconsistent with that proposition.

Rostker, which upheld Congress's exclusion of women from registration for the military draft, is an odd case to cite in support of petitioner's position. Petitioner's amici focus on the fact that the Court declined the government's invitation to state explicitly that all congressional decisions in the special context of the military would be reviewed under the traditional "rational basis" test. See 453 U.S. at 69. We note, however, that *Rostker* (which involved the rights of citizens, not aliens outside the United States) treated with the same skepticism both "[a]nnounced degrees of 'deference'" in particular contexts and "levels of 'scrutiny' which this Court announces that it applies to particular classifications." *Id.* at 69-70. Nonetheless, the Court explicitly recognized that "the [constitutional] tests and limitations to be applied [might] differ because of the military context." *Id.* at 67. We regard the principle of deference as more important than any particular verbal formula that may be used to represent it. In any event, apart from the fact that it arose in another specialized area in which the Court has traditionally accorded Congress's decisions particular deference (see *id.* at 64-65), *Rostker* bears scant resemblance to this case. Certainly it did not call into question the long line of cases dealing specifically with the equally special, but quite distinct, area of immigration and nationality. That is the area at issue here.

3. Finally, petitioner and her amici cite a variety of cases dealing with claims of gender discrimination in

purely domestic legislation, in which the Court has made clear that it will require the government to articulate an "exceedingly persuasive" justification before it will uphold legislative classifications that restrict the availability of rights or opportunities solely on the basis of gender. *United States* v. *Virginia*, 116 S. Ct. 2264, 2275-2276 (1996) (*VMI*). Those cases are inapposite here for at least two reasons.

First, the cases cited do not address legislation dealing with immigration or the naturalization of aliens abroad, and they provide no basis for overturning this Court's long history of according deference to congressional decisions in that sphere. The Court has previously applied the principle of deference in this area even in the face of claims based on, for example, rights under the First Amendment, to which this Court has traditionally accorded the most far-reaching constitutional protection. Compare *Mandel*, 408 U.S. at 765-770; *Galvan*, 347 U.S. at 530-532 (political affiliation). As *Fiallo* correctly recognized, there is no reason to apply any higher standard to a claim under the Fifth Amendment. See 430 U.S. at 794-795 (declining to vary *Mandel*'s standard in reviewing a claim of "'double-barreled' discrimination based on sex and illegitimacy"). Whatever a citizen's interest in the matter, the actual subject of an immigration or naturalization law like that at issue here is the alien abroad, who has no right to invoke the heightened scrutiny of gender-based distinctions that is required in other contexts by the United States Constitution.

Second, this case does not involve a legislative scheme that differentiates between otherwise similarly situated men and women on the basis of their gender. Petitioner is not treated any differently from a male child who is otherwise similarly situated. And even if we assume that petitioner may challenge any distinction between her father

(who is not before the Court) and a hypothetical unwed citizen mother, the differentiation in Section 309 is not based on invidious gender stereotypes, but on real differences in the situation of the citizen mothers and putative citizen fathers of illegitimate children born abroad. See pages 24-34, *supra*. The Fifth Amendment "embodies a general rule that [government] must treat like cases alike but may treat unlike cases accordingly." *Vacco* v. *Quill*, No. 95-1858 (June 26, 1997), slip op. 4. Here, "men and women are not similarly situated," and the "statutory classification is realistically based upon the differences in their situations." *Parham*, 441 U.S. at 354 (plurality opinion).[22]

IV. EVEN IF THE DISTINCTIONS DRAWN BY SECTION 309 WERE UNCONSTITUTIONAL, A COURT SHOULD NOT DECLARE PETITIONER TO BE A CITIZEN

Even if the Court were to disagree with our analysis and hold the distinctions drawn in Section 309 to be

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[22] For the reasons stated in the text, the distinctions drawn in Section 309 are constitutional even if, contrary to our submission, they are subject to the scrutiny ordinarily given to gender distinctions in the domestic context. The different treatment of the foreign-born children of citizen fathers and those of citizen mothers addresses significant differences in their status. The approach of Section 309, moreover, serves "important governmental objectives" in establishing paternity and in ensuring that the child has significant ties to the United States, and the "'means employed' are 'substantially related to the achievement of those objectives.'" *VMI*, 116 S. Ct. at 2275 (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Indeed, as evidenced by *Clark*, *Lehr*, *Parham*, *Lalli* and *Quilloin*, fathers of illegitimate children are treated differently than mothers in a number of different contexts under domestic law. See also *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48-49 (1989) (applying traditional common-law rule that illegitimate child takes mother's domicile); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

unconstitutional, the appropriate remedy would not be the one petitioner seeks—a judicial declaration that she is a citizen of the United States. The assertedly unconstitutional distinction at issue here is not between legitimate children, whose claims are governed by Section 301(g), and the illegitimate children whose claims are governed by Section 309. It is the distinction, wholly within the category of illegitimate children governed by Section 309, between those whose citizen parent is the father and those whose citizen parent is the mother. If the Court held that distinction unconstitutional, any remedial measure would have to focus on eliminating inequality between the two classes treated differently by Section 309. The remedy might consist of eliminating entirely Section 309's authorization for the naturalization of foreign-born illegitimate children, or of attempting to announce some rule under which Section 309 could be applied identically to children of citizen fathers and citizen mothers. In neither circumstance, however, would it be proper for a court to confer citizenship on petitioner.

A. Section 301(g) May Not Be Applied To A Child Born Abroad Out Of Wedlock

Petitioner contends (Br. 15) that if Section 309 of the INA were eliminated, she would be entitled to claim citizenship under Section 301(g). That is incorrect.

In *INS* v. *Pangilinan*, 486 U.S. 875 (1988), this Court held that a federal court has no equitable power to confer citizenship on a litigant as a remedy for a governmental violation of a statute under which he or she might otherwise have qualified for naturalization. *Id.* at 882-885. The Court made clear that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." *Id.* at 883-884. If Congress has set specific statutory limits on a

naturalization provision, then "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations." *Id.* at 885.

As we have explained, Section 301(g) of the INA may be traced back directly to Section 201 of the Nationality Act of 1940, which in turn resulted from a comprehensive reexamination and codification of United States nationality law. As a result of that process, new Sections 201(c) and (g) distinguished, for the first time, among different situations involving the birth of children outside the United States to citizen couples, on the one hand, and to couples only one of whom was a citizen, on the other. At the same time, Congress also enacted new Section 205 to deal specifically with the situation of children born abroad out of wedlock. The parallel structure was carried over to Sections 301 and 309 of the present INA. Thus, from the beginning, Congress has provided the "general rule" (Pet. App. 7) of Section 301(g) only in explicit conjunction with a *different* provision specifically applicable to the case of illegitimate children. The provisions must be read together (see, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)); and the proper reading is not, as petitioner suggests (Br. 14-15), that Section 301(g) "grants" citizenship which Section 309 then "takes away," but that Congress never intended Section 301(g) to apply at all to children born out of wedlock, except under the conditions prescribed by Section 309(a).

Section 309(a) states that the "provisions of" Section 301(g) "shall apply" to a person born out of wedlock to a citizen father only "if" certain stated conditions are met. Moreover, Section 309(c), which provides the necessary concomitant rules for illegitimate children born to a citizen mother, does not refer back to Section 301 at all.

The fact that Section 309(a) uses the shorthand of cross-reference should not obscure the fact that Congress enacted two separate provisions to deal with two separate situations. Indeed, the remedy petitioner seeks would be no more proper than if a court were to hold Section 301(g) unconstitutional and then to conclude that Section 301(c), which applies to two-citizen couples, could thereafter be applied to the child of a mixed-citizenship couple, *faute de mieux*. Sections 301(g) and 309(a) were enacted to apply to different situations, and a holding that the latter embodies unconstitutional distinctions would not make it permissible to extend the former beyond the scope that Congress intended it to have.

B. Remedial Expansion Of Section 309's Terms For Conferring Citizenship Would Be Inappropriate

The court of appeals therefore erred in concluding that there was any statutory authority apart from Section 309 for declaring petitioner to be a citizen. That conclusion does not necessarily end the remedial inquiry, because a court might also seek to remedy an equal protection violation by either expanding or limiting the benefits conferred by Section 309 itself so as to grant or deny them "equally" to all. *Heckler* v. *Mathews*, 465 U.S. 728, 738-740 (1984). In this case, however, as in *Heckler*, there are strong reasons to conclude that it would be inappropriate for a court to expand the unique benefit of citizenship to a class of persons on whom Congress has chosen not to bestow it.

1. First, as we have discussed, the area of nationality is an exceptionally important one, in which congressional power is at its peak, and judicial authority severely circumscribed. Likewise, as this Court has always recognized, the benefit of American citizenship is a particularly precious one. See, *e.g.*, *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). For those reasons, in naturalization cases Congress would be particularly unlikely to approve, and the courts should be particularly reluctant to supply, remedial solutions that go beyond what Congress itself has expressly chosen to authorize.

2. Second, nationality provisions such as Sections 309(a) and (c) are part of a reticulated statutory scheme, and a court must beware of attempting to pull one strand if it will not be able to reweave the tapestry. In this case, it is difficult to see exactly how the provisions at issue might be equitably "equalized." Striking the "burdens" of Section 309(a) in favor of equal application of the "benefits" of Section 309(c) would confer citizenship (presumably retroactively) on thousands of foreign-born children with literally no connection to this country other than a blood relationship to a citizen father they have never known or even seen. In addition, it would have the anomalous result of according an illegitimate foreign-born child with only one citizen parent the benefit of a parental residency requirement substantially more favorable than that applicable to the child of a mixed-citizenship *married* couple under Section 301(g), and in one respect more favorable than that applicable to the child of a two-citizen married couple under Section 301(c). On the other hand, nullifying the challenged benefits of Section 309(c) not only would subject the illegitimate children of citizen mothers to a substantially enhanced parental residency requirement, with the concomitant increase in the risk of statelessness that we have described (see pages 33-34, *supra*), but also would give rise to perplexing questions of what action, exactly, the State Department should require a citizen mother to have taken by the time her child turns 18 in order to satisfy an acknowledgment-or-legitimation requirement designed to accommodate the very different legal situation of unwed fathers.

In short, the courts do not have the institutional competence to craft a nuanced remedy that might properly take into account all the interests that Congress had in view when it crafted Section 309. See *Califano* v. *Westcott*, 443 U.S. 76, 92-93 (1979). Without such crafting, however, there can be no firm basis for believing that a court's remedial solution will approximate what Congress would have chosen had it been forced to consider the problem under newly announced constitutional constraints. Under such circumstances, respect for the legislative function in this particularly important and sensitive area suggests that, while a court may declare that the distinctions drawn in Section 309 are unconstitutional, it should, under *Pangilinan*, avoid expanding the class of persons to whom citizenship is accorded beyond the limits that Congress has specifically approved, and should leave to Congress the task of deciding how to rework the statutory scheme to achieve its legislative goals in a constitutional manner. See *Mathews*, 465 U.S. at 739 n.5 ("[T]he court should not, of course, 'use its remedial powers to circumvent the intent of the legislature,'" and "should therefore 'measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'"); compare *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982) (plurality opinion).

3. Finally, a remedial grant of citizenship would be extraordinary not only because of its importance, but also because of its potential irreversibility. Unlike monetary benefits (see *Westcott*, 443 U.S. at 89-93), which Congress may always prospectively reduce, eliminate, or redistribute in response to a judicial expansion of the entitled class, citizenship, once properly conferred, may not normally be rescinded by legislative action. See *Afroyim* v. *Rusk*, 387

U.S. 253 (1967). Of course, any remedy that limits the ongoing availability of naturalization at birth in order to "equalize" the situation of illegitimate foreign-born children claiming through citizen mothers and those claiming through citizen fathers would have an effect on illegitimate children born abroad to U.S. citizens in the future. It would not, however, take away any benefit of citizenship from persons who have already attained it, compare *Westcott*, 443 U.S. at 90, and Congress could at least correct any hardship, retroactively, if and as it saw fit.[23] Compare *Mathews*, *supra*. Courts should therefore prefer remedial limitation or nullification to expansion of a naturalization statute, at least in the absence of extraordinary circumstances not presented by this case.

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[23] We do not believe that even complete invalidation of Section 309 would either require or permit any change in the status of individuals already recognized as citizens under its terms. The savings and severability provisions of the INA (§§ 405-406, 8 U.S.C. 1101 note) suggest a congressional policy in favor of protecting persons who have already attained citizenship under repealed, amended, or invalidated provisions. Moreover, individuals once recognized as citizens might, at least under the circumstances of this case, be protected from judicial expatriation by analogy to the protection from legislative expatriation afforded all citizens under *Afroyim* v. *Rusk*. See also *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."). The INA's severability clause would also call for the continued application of all valid nationality provisions to persons who become eligible in the future under the statute's terms, but not for the extension of citizenship to new persons on whom Congress has not itself conferred it. Compare *Westcott*, 443 U.S. at 90 (dictum concerning severability provision in context of ongoing receipt of monetary benefits).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1997

APPENDIX A

1. Article I, Section 8, Clause 4, of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

3. Section 301 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 235 (1952), as amended, 8 U.S.C. 1401, provides*:

Nationals and citizens of United States at birth

SEC. 301. The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the

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* The "outlying possessions" of the United States are American Samoa and Swains Island. 8 U.S.C. 1101(a)(29).

granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possession of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of

the United States who, prior to the birth of such person, had resided in the United States.

4. Section 309 of the INA, 66 Stat. 238, as amended, 8 U.S.C. 1409, provides:

Children born out of wedlock

SEC. 309. (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years—

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

5. Before amendment by the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 96-653, § 13, 100 Stat. 3657, and the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, §§ 8(k) and 9(r)(2), 102 Stat. 2617-2618, 2621, Sections 309(a) and (c) of the INA, 8 U.S.C. 1409(a) (1982), read as follows:

Children born out of wedlock

SEC. 309. (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of

such child is established while such child is under the age of twenty-one years by legitimation.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

6. Before their repeal by Section 403(a)(42) of the INA, 66 Stat. 280, Sections 201(g)-(h) and 205 of the Nationality Act of 1940, 54 Stat. 1139-1140, read as follows:

SEC. 201. The following shall be nationals and citizens of the United States at birth:

* * * * *

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the

United States or its outlying possessions for a period or periods of totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

* * * * *

SEC. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:93CV39

LORELYN PENERO MILLER

v.

SECRETARY OF STATE, WARREN CHRISTOPHER

[Filed: June 2, 1993]

ORDER

Came on for consideration Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint or, in the Alternative, to Transfer Venue, and the Court having considered the motion, and Plaintiffs' response along with the pleadings on file in this case, is of the opinion that the following Order should be entered.

In January 1993, this case was filed by Plaintiff Lorelyn Penero Miller, a resident of Angeles City, in the Republic of the Philippines. Defendant responded by filing a Motion to Dismiss or, in the Alternative, to Transfer Venue, alleging that there was no basis for venue in the Eastern District of Texas. Plaintiff then filed an Amended Complaint, adding Charlie R. Miller as an additional Plaintiff. Mr. Miller is the

natural father of the original Plaintiff. Mr. Miller alleges that his Constitutional right to equal protection under the laws has been violated because, unlike the mother of an illegitimate child, he is not allowed to pass on his citizenship to his daughter. The only relief prayed for in Plaintiffs' Amended Complaint is the removal of impediments to the granting of Ms. Miller's United States citizenship.

Defendant alleges, on the basis of the pleadings now before the Court that Mr. Miller should be dismissed from the lawsuit because he lacks standing requisite for a plaintiff seeking the relief sought in the First Amended Complaint. Mr. Miller concedes that there is no constitutional right to transmit citizenship by descent. *Rogers v. Bellei*, 401 U.S. 815, 830, 91 S.Ct. 1060, 1069 (1971). However, he alleges that the Immigration and Nationality Act of 1952, as amended, violates the rights of fathers of children born out of wedlock outside of the United States to equal protection of the laws. The Supreme Court has reviewed the reasons underlying the distinction between mothers and fathers of children born out of wedlock, and determined that the distinction did not violate the equal protection clause of the United States Constitution. *Fiallo v. Bell*, 430 U.S. 787, 797-799, 97 S.Ct. 1473, 1480-81, 52 L.Ed.2d 50 (1977). Since the Supreme Court has determined the issue contrary to Mr. Miller's position, he cannot rely on it to create venue in this district.

Mr. Miller urges this Court to rely on *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407 (9th Cir. 1993) for the proposition that a dispute involving citizenship is fundamentally different than the dispute in *Fiallo* which concerned preferential treatment of aliens. Assuming, for the sake of the argument that

Wauchope is compatible with Supreme Court precedent and does no violence to [the] rule of stare decisis, it does not establish standing for Mr. Miller in this case. In *Wauchope*, the Ninth Circuit found that the Plaintiffs established standing by asserting their own legal injury as a result of being denied citizenship. The Plaintiffs' parents, whose equal protection rights came into issue, were not parties to the action. Article III of the United States Constitution requires a "case or controversy" between the parties to an action in this Court. Mr. Miller's pleadings assert no cognizable injury, even under the reasoning adopted in *Wauchope*. *Wauchope* simply does not support the Plaintiffs' position that Mr. Miller has standing to be a Plaintiff in this case.

The Court finds that Mr. Miller should be dismissed as a Plaintiff in this case based on his lack of standing. Ms. Miller has asserted no facts that support venue in the Eastern District of Texas without Mr. Miller as a party to the case. The Court therefore finds that the case should be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1406(a). Venue in that district is appropriate pursuant to 28 U.S.C. § 1391(e)(1), as it is the residence of the Defendant in this action.

It is, therefore, ORDERED that Plaintiff Charlie R. Miller is dismissed as a Plaintiff in this action. It is further ORDERED that the case is transferred to the United States District Court for the District of Columbia.

Signed this 2nd day of June, 1993.

/s/ ROBERT M. PARKER
ROBERT M. PARKER, Chief Judge

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 96-1060

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
Secretary of State
of the United States,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

This Court specifically identified the parameters of the original grant of *certiorari*, 65 USLW 3726 (April 29, 1997) with a clarification which stated:

> The petition for a writ of certiorari is granted limited to the following question: Is this distinction in 8 U.S.C. §1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment question to the United States Constitution? 65 LW 3753 (May 13, 1997).

This Court granted certiorari in this case on one issue only: Whether the gender discrimination in 8 U.S.C. §1409 violates the Constitution. Respondent is unable to defend the gender based distinctions in that statutory provision, and instead focuses on other issues. The portions of respondent's brief which deal with the justification for the gender based discrimination at issue fall back on gender based stereotypes, clearly demonstrating the need to invalidate the distinction.

In reply, petitioner addresses respondent's allegations aimed at preventing the Court from looking directly at the gender discrimination at issue and then demonstrate that respondent's defense of the statutory provision is itself based on improper assumption about gender distinctions.

I. THE CONSTITUTION APPLIES TO THIS CASE

A. The Court Should Not Consider The Government's New Argument That Was Not Raised Below

The Government contends that the judgment below should be affirmed because Ms. Miller "has no substantive rights cognizable under the Fifth Amendment." Resp. Br. at 11-12. This argument was not raised below and should not be considered for the first time by this Court. In the courts below, the Government contended that Section 309(a) passed constitutional muster under the deferential standard applied by this Court in *Fiallo v. Bell*, 430 U.S. 787 (1977), but never argued that Ms. Miller had no Fifth Amendment rights at all. Nor did the Court of Appeals consider this point on its own. A respondent is entitled to raise only those arguments "appearing in the record." *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). The Court should continue to decline to entertain arguments the Court below had no chance to consider. See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.2 (1990).

B. Ms. Miller Has Constitutional Rights

If the Court were to consider the argument the Court should reject it. The Government must abide by the Constitution regardless of whether its actions affect persons who live within our borders or abroad. The cases cited by the Government hold only that certain constitutional claims raised by aliens are subject to narrow judicial review in certain circumstances; the cases do *not* hold that

the Constitution does not apply at all to aliens residing abroad.

In fact, *Fiallo v. Bell*, 430 U.S. 787 (1977) is a complete answer to the contention that Ms. Miller has no constitutional rights. The Court expressly noted there is a "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . " 430 U.S. at 793 n.5. While the statute in that case was subject "only to limited judicial review," it was not true that "the Government's power in this area [*i.e.*, immigration] is never subject to judicial review." *Id.* at 796 n.6. Thus aliens have constitutional rights. Even an alien is a "person" within the meaning of the Fifth Amendment. See *Plyler v. Doe*, 457 U.S. 202, 210 (1982). ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term").[1]

In the most recent of the cases, affirming that aliens do have constitutional rights, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the Fourth Amendment did not prohibit a search by government agents abroad, but clarified that the Fourth Amendment "operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id.* at 264.

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[1] Under the Government's theory, Congress apparently could decide that only white children born abroad of citizen parents may become citizens, and the Constitution would have nothing to say about the decision. This scenario is not so far removed from this case, where Ms. Miller is not entitled to citizenship solely because she was born of a citizen father, rather than a citizen mother. The Court should not declare the Constitution inapplicable to such decisions.

Indeed, Justice Kennedy wrote separately to emphasize that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic". Justice Kennedy made it clear that the Court [did] not decide [ ] . . . that persons in the position of the respondent have no constitutional protection" *Id.* at 278. To the contrary, he stated "all would agree" that the alien Defendant was protected by the Due Process Clause of the Fifth Amendment. *Id.*

Ms. Miller is not merely an alien seeking admission to the United States; she is the daughter of an American citizen pressing a claim that she is entitled to the same citizenship test Congress has *determined* is appropriate for children of citizen mothers. Contrary to the Government's contentions, the Court has never held that the Due Process Clause is inapplicable to such a claim. It should not do so now.

C. Ms. Miller May Raise The Rights Of Her Citizen Father

The Government is also wrong to contend that Ms. Miller lacks standing to raise the constitutional rights of her citizen father. See Resp. Br. at 11 n.2. A party is entitled to raise the rights of third parties if (1) the litigant has "suffered an 'injury in fact,' giving a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) the litigant has "a close relation to the third party"; and (3) there is "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio,* 499 U.S. 400, 411 (1991) (citations omitted).

The Government does not dispute Ms. Miller has suffered an "injury in fact" giving her a "sufficiently concrete interest" in the outcome of this case, nor that Ms. Miller and her father have the requisite "close relation" to each other.

Instead, the Government only disputes the existence of a "hindrance" to petitioner's father's assertion of his own rights. However, Mr. Miller was unable to assert his own rights because upon the Government's own motion, he was denied standing to litigate them.

The Government, however, contends Mr. Miller was not hindered in the assertion of his rights because he "could have remained a party by appealing from the order dismissing him as a plaintiff." Resp. Br. at 11 n.2. This is unfair, if not hypocritical. Contrary to the Government's assertion the District Court "essentially rejected [Miller's,] claim on the merits", *Id.*, the Court's opinion makes clear Mr. Miller's case was dismissed not on the merits, but rather for lack of standing because his "pleadings assert no cognizable injury . . . " Resp. Br. at 11a.[2]

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[2] In opposing the Government's motion to dismiss for lack of standing, Mr. Miller relied on *Wauchope v. U.S. Department of State,* 985 F.2d 1407 (9th Cir. 1993), which had distinguished this Court's decision in *Fiallo* on the merits of the constitutional question presented here. The District Court, however, held that even if *Wauchope* was compatible with *Fiallo,* Mr. Miller would still lack standing because the plaintiffs in *Wauchope* "had established standing by asserting their own legal injury as a result of being denied citizenship" while the plaintiffs' parents "were not parties to the action." Resp. Br. at 10a-11a. Thus, according to the court, "Mr. Miller's pleadings assert no cognizable injury, even under the reasoning adopted in *Wauchope.*" *Id.*

Having successfully contended below that Mr. Miller lacked standing because his interest in seeing his daughter recognized as a citizen was not a cognizable injury for purposes of Article III, the Government now contends Mr. Miller suffered no hindrance to the assertion of his rights. Mr. Miller's dismissal was at the very least a "hindrance," and one the Government itself deliberately and successfully brought about. Ms. Miller therefore meets all three criteria for raising her father's constitutional rights.

II. *FIALLO* DOES NOT GOVERN PETITIONER'S CITIZENSHIP CLAIM

Respondent next seeks to save the gender based classification at issue by arguing that cases addressing the rights of aliens in the realm of entry or expulsion dictate the standard of review applicable to Ms. Miller's claim of citizenship. See Resp. Br. at 21-23, 34.

None of the cases Respondent cites concern the claim of citizenship-at-birth that Ms. Miller raises. The Government is unable to cite such a case because this Court has never applied the deferential *Fiallo* standard of review to a citizenship claim, especially when gender stereotyping is the basis for a discriminatory denial of citizenship. In any event, the Court's rulings in *Landon v. Plasencia*, 459 U.S. 21 (1982) – which imposed constitutional scrutiny based on the alien's *ties* to the United States notwithstanding her location – and *Rostker v. Goldberg*, 453 U.S. 57 (1981) – which applied heightened scrutiny in an area where the deference due Congress is equal, if not greater

than, the deference due in the immigration context – supersede the Government's reliance on *Fiallo*.

First, the determination of who is a citizen in the first instance is entirely different from a claim by an individual who acknowledges her alienage but seeks the "right" to immigrate. See Pet. Br. at 9; Ami. Br. at 19-20; *Wauchope v. U.S. Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993). Petitioner's claim is distinct from cases challenging a naturalization requirement or demanding judicial naturalization. The INA establishes three distinct methods of acquiring U.S. citizenship: (1) by birth in the United States, (2) by naturalization; and (3) by birth abroad to U.S. citizen parent(s). Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, §93.01[5][a] (Rev. Ed. 1997). The Act embodies the fundamental difference between the eventual naturalization of a person who was – indisputably – an alien, and the status of an individual who is born a citizen. Naturalization is the "conferring of nationality of a state upon a person **after birth,** by any means whatsoever," INA §101(a)(23) (emphasis added), whereas the petitioner and others born abroad to a U.S. citizen are "nationals and citizens of the United States **at birth**." INA §301 (emphasis added). Unlike a person seeking to naturalize or immigrate, Ms. Miller seeks to establish her U.S. citizenship by virtue of her birth.[3] The

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[3] Neither *Wong Kim Ark*, 169 U.S. 649 (1898) nor *Rogers v. Bellei*, 401 U.S. 246 (1978) require or authorize extending the rationale of Fiallo to Ms. Miller's claims. In *Wong Kim Ark*, the Court considered the rights of children born in the United States and invalidated Congress' denial of citizenship. The Court's *dicta* in *Wong Kim Ark* equating naturalization with conferral of citizenship through birth, Resp. Br. at 39, is inconsistent with

deference afforded Congress' power over admissions of aliens is inapplicable to a person who claims she has been denied citizenship solely in violation of her right to equal protection.

Second, *Landon v. Plasencia,* which this Court decided after *Fiallo,* holds that the critical inquiry for Ms. Miller are her *ties* to this country. 459 U.S. at 31. In *Landon,* legal permanent residence status was sufficient to trigger due process safeguards notwithstanding the "firmly embedded" (Resp. at 23 (citing *Fiallo*)) deference to congressional decisions. Ms. Miller has even stronger ties to the United States than Plasencia – a claim of citizenship at birth because she was born to a U.S. citizen. That relationship, which the Government does not dispute, provides a tie to this country that must allow her to invoke the heightened level of constitutional scrutiny required of legislation that discriminates based on gender stereotypes.[4]

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modern notions of naturalization and inapplicable to Petitioner. See *Immigration Law and Procedure,* §93.01[5][a]. *Rogers v. Bellei* concerned the power of Congress to impose a *non-discriminatory* condition subsequent requiring a period of residency in the United States for a person born abroad to maintain U.S. citizenship. The Court stressed that since Congress could adopt the greater restrictions of eliminating citizenship for children born abroad altogether, that the lesser condition subsequent was permissible *Id.* at 835. The logic that the power of the greater includes the power of the lesser does not, of course, permit a discriminatory denial of benefits.

[4] Applying heightened scrutiny in this case does not "confer rights on all the world as third party beneficiaries." Resp. Br. at 23. Petitioner is not random, unconnected third party, but an individual belonging to a limited class, i.e., those born to a U.S. citizen parent, that Congress has recognized has ties to the United States.

Recognition of Petitioner's blood tie to her U.S. Citizen father to facilitate unity of citizen families does not jeopardize or undermine this country's tradition of *jus soli.* Despite Respondents' contention that *jus soli* is this Nation's one and only "fundamental rule of citizenship," Resp. Br. at 13, conferral of citizenship by descent, or *jus Sanguis,* has had as long and legitimate a history, beginning with the First Congress in the Act of March 26, 1790, as the constitutionally mandated *jus soli,* 1 Stat. 103, 104. See *Immigration Law and Procedure,* §93.01[3]. While the precise parameters of *jus sanguis* have evolved with time, the ability to pass on U.S. citizenship at birth from parent to child for at least one generation, has been guaranteed since the founding of the nation. The only contemporary exception to that principle is the gender-based discrimination at issue here.

Third, this Court has made clear in another post-*Fiallo* decision, *Rostker v. Goldberg,* 453 U.S. 57 (1981), that even with the enormous deference due Congress in the exercise of its sovereign power over national security and foreign affairs, the heightened scrutiny standards of the Equal Protection Clause cannot be ignored. As Amici discussed in detail, *Rostker* shows, like national security matters, immigration decisions by Congress cannot be insulated from heightened scrutiny standards merely by invoking the deferential description this Court has given to Congress' immigration power. Ami. Br. at 15-17. The *Rostker* Court applied heightened scrutiny, despite judicial deference to Congressional judgments in the military context, because the policy at issue there, as here, discriminated on the basis of gender. *Id.* at 69-72.

Congress could, if it chose, eliminate citizenship to children born abroad to **all U.S. citizens** consistent with the Fourteenth Amendment. But once Congress confers citizenship on **some** children based on their descent from **some** citizen parents, Congress may not deny the same right to other children based on discriminatory criteria. The antiquated notions of legitimacy and parenthood embodied in §309(a) cannot be saved by reference to Congress' "immigration" or "naturalization" power.

III. UPON A FINDING THAT A U.S.C. §1409 IS UNCONSTITUTIONAL, THE COURT CAN REMEDY THE DISCRIMINATION AGAINST PETITIONER

In the last ditch effort to save the statutory provision at issue, respondent's attempt to make the question of remedy more complicated than it is. Respondents argue that (1) this court cannot redress plaintiff's injury because it cannot confer citizenship under Section 301(g), and (2) that remedial expansion of Section 309's terms is inappropriate. They are wrong on both counts.

A. The Court Of Appeals' Holding That The Federal Court Has The Power To Strike Down Section 309(a) As Unconstitutional And Order Section 301(g) To Apply Must Be Upheld.

Whether a Federal court can order relief if the provision at issue is found unconstitutional was already addressed by the Court of Appeals, which found that it could. The D.C. Circuit held:

> Ms. Miller did not request the court to grant her citizenship; rather, she requested that the court declare section 1409(a) unconstitutional and merely make a finding under the general rule applicable to persons born outside of the United States, 8 U.S.C. §1401(g) [Section 301(g)]. . . . We agree with Ms. Miller that, if the district court had held section 1409(a) [Section 309(a)] unconstitutional, it could have found that she was a U.S. citizen pursuant to section 1401(g) [Section 301(g)]. Such a finding would not have violated Pangilinan's [*INS v. Pangilinan*, 486 U.S. 875 (1988)] proscription on the exercise of judicial equitable power to confer U.S. citizenship in this absence of legislative authority. 96 F.2d at 1470 (D.C. Cir. 1996).

The Court of Appeals' holding on this issue should be affirmed.[5]

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[5] In addition, respondent's arguments on this point are not properly before the Court. Although explicitly decided by the D.C. Court of Appeals, respondent failed to file a cross-petition on this issue and the question was not part of the grant of certiorari. It is well-settled that a prevailing party may defend favorable judgment without filing a cross-petition only where that party "seeks to preserve, and *not to change* that judgment." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) (emphasis supplied). A cross-petition is necessary even where the respondent seeks to raise an argument that would result in *less* relief than was granted to the respondent below. See *FERC v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976) (where court of appeals had invalidated license fees in their totality, in absence of cross-petition respondent could not raise alternative argument that would have resulted in invalidation of only a portion of the fees); see also *Granfinanciers, S.A. v. Nordberg*, 492 U.S. 33, 40 (1989).

This rule applies with full force here. The Court of Appeals rejected petitioner's contention that Section 309(a) is

It is no wonder that respondents attempt in a convoluted way to argue that Section 301 does not apply since that provision makes it clear that Congress' general intent was to confer citizenship of children born to one and only one citizen parent. As Section 301 states:

> The following shall be nationals and citizens limits of the United States at birth: . . .
>
> (g) a person born outside the geographical limits of the United States and its outlying possessions of *parents* one of whom is an alien, and the other citizen of the United States . . .
>
> (emphasis supplied).

That provision does not limit the definition of parent to married parents. Indeed, Section 309, the provision at issue in this lawsuit provides that Section 301 applies generally to out-of-wedlock children, and out-of-wedlock children of citizen mothers become citizens in much the same way as do children with married parents under Section 301. If the differential way the provision applies to children of citizen fathers as opposed to children with citizen mothers is unconstitutional, the appropriate remedy is to strike down Section 309 and apply Section 301 as

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unconstitutional, but also rejected respondent's contention that the court had no authority to order the requested relief. Respondent now attacks that latter holding, arguing that even if petitioner is entitled to a declaratory judgment that the statute is unconstitutional, this Court may not order that citizenship be conferred upon her. If successful, however, that argument would not merely *preserve* the judgment, resulting in an alteration of the rights established under it. Without a cross-petition seeking review of that question, the Court cannot consider it.

it is applied to all children born abroad of one citizen parent. Take Section 309(a) away, and the statutory scheme in sections 301 and 309 are harmonious in conferring citizen status on all children born abroad of one citizen parent. Thus, the statutory language and statutory scheme support the holding of the Court of Appeals that relief can and should be granted to petitioner if Section 309 is unconstitutional.

B. Remedial Expansion Is The Appropriate Remedy In This Case.

This Court has consistently remedied equal protection violations by extending benefits to excluded classes rather than withdrawing them.[6] As stated in *Califano v. Westcott*, 433 U.S. 76, 89 (1979): "In previous cases involving equal protection challenges to under inclusive. . . . statutes, this Court has suggested that extension, rather than nullification, it the proper course."[7]

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[6] The only exception to this general rule has been in cases where this Court has held a state statute unconstitutional under which circumstances the Court has shown an understandable reluctance in the interests of federalism to impose its interpretation of remedy and has instead sent the case back to the state courts for a remedy determination. See *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989); *Wengler v. Druggists Mutual Insurance Company, et al.*, 446 U.S. 142 (1980).

[7] See e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 691 and n. 25 (1973) (plurality opinion) . . . *Califano v. Goldfarb*, 430 U.S. 199 (1977), *aff'g*, 396 F. Supp. 308, 309 (E.D.N.Y. 1975); *Califano v. Silbowitz*, 430 U.S. 924 (1977), *summarily aff'g*, 397 F. Supp. 862, 871 (S.D. Fla. 1975); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), *aff'g*, 367

Here, the statutory scheme clearly supports use of the simpler test for all children born abroad of one citizen parent. The appropriate remedy is to strike down the offending provision and order the provisions of section 301(g) and 309(c) to apply to the citizenship determination of petitioner.

IV. THE GOVERNMENT'S DEFENSE OF THE GENDER-BASED DISTINCTIONS AT ISSUE HERE RESTS ON IMPERMISSIBLE AND OVERBROAD GENDER STEREOTYPES, UNDERSCORING THE UNCONSTITUTIONALITY OF SECTION 1409(a)

When the issue of whether the gender based distinctions in Section 309 are constitutional are finally addressed, the arguments the respondent makes are largely based on the types of archaic and stereotypic notions which the Court has refused to accept in cases such as *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) and *U.S. v. Virginia*, 116 S.Ct. 2264 (1996). Such grounds fall far short of establishing even a "rational basis" for Section 309(a) differential treatment of men end women, much less passing muster under the heightened scrutiny applicable here. See *United States v. Virginia*, 116 S.Ct. 2264 (1996); Pet. Br. at 10, 21-24; Amici Br. at 14, 20-22.

F. Supp. 981, 991 (D.N.J. 1973); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), *aff'g*, 345 F. Supp. 310, 315-6 (D.D.C. 1972); *Richardson v. Griffin*, 409 U.S. 1069, *summarily aff'g*, 346 F. Supp. 1226, 1237 (Md. 1972). "(Cross cites deleted). Although these cases have generally involved government benefits, identical reasoning applies to the question of whether to grant remedial expansion or constriction of the statutes at issue.

In attempting to justify the requirements of Section 309(a), the Government suggests Congress was motivated by the twin concerns of ensuring (1) an application for citizenship be based on a "genuine tie to the United States," Resp. Br. at 24, rather than a "mere blood relationship between the citizen parent and out-of-wedlock child," Resp. Br. at 18; and (2) a financial support obligation can be enforced against the citizen parent. Resp. Br. at 25. But the government never explains how these concerns justify the gender discrimination Congress relied on to advance the concerns.[8]

For example, to meet the requirement of showing more than a "mere blood relationship," a father must establish paternity prior to the child's 18th birthday, must formally agree to support the child financially until age 18, and must have resided in the United States for five years prior to the child's birth (including at least 2 years after age 14). Only then, asserts the Government, will the citizen father and child be "in a position roughly equivalent to that of the typical foreign-born child claiming through an unmarried citizen mother." Resp. Br. at 24. A

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[8] That gender stereotypes underlie these immigration provisions is not surprising. Indeed, the history of Section 1409(a), set out in the Resp. Br. at 15.18 n.7, chronicles the shift from the 1790 formulation of the law, establishing fathers as the sole conduit for nationality, to the 1934 (and current) regime, which posits mothers as the transmitters of culture and national ties. See also Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593 (1991) and Gary Endelman and Bill Coffman, *The Changing Face of Equal Protection: Gender Bias in U.S. Citizenship Law*, Immigration Briefings, March 1995, 1 (describing history of gender-based immigration laws).

citizen mother, in contrast, need simply give birth to the child, and have previously resided for one year in the United States. She need not demonstrate that she established a certain relationship with the child by a certain date, or an ability or willingness to support the child.

The Government argues, based solely on stereotypes and without benefit of any data that these differential requirements are justified because, in addition to the mother's "established legal relationship with her child from the moment of birth," Resp. Br. at 24, the mother will "normally" be legally responsible for the child's support during minority, *Id.*; she will "typically" have custody of the child, *Id.* at 25, 33; and she is "sufficiently likely . . . to have a substantial personal relationship that there is no need to require further evidence of early and significant ties" to the United States. Resp. Br. at 29, 33. Because these mothers' "norms" are not "typical" of fathers, the Government asserts, the law must always pose additional requirements on fathers beyond those imposed on mothers.

The Government equates custody, support, and ties to the United States with motherhood – without requiring proof of any of these factors. There is clearly no direct or inherent relationship between these elements and the sex of the citizen parent. As set out at length in Petitioner's initial brief and the brief of Amici, men and women are similarly situated with respect to their ability to serve as good parents. Pet. Br. at 23-24; Amici Br. at 7-12. Under the most charitable interpretation, the Government's rationales are generalizations based on "administrative convenience" of the type squarely rejected in *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("any statutory

scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands dissimilar treatment for men and women who are . . . similarly situated,") (emphasis in original; citing *Reed v. Reed*, 404 U.S. 71 (1971)). More likely, these generalizations rest on, and perpetuate, invidiously discriminatory stereotypes that have been repeatedly condemned by this Court and limit the potential of both men and women. Amici Br. at 10-12.

Moreover, the generalizations on which the Government bases its defense of Section 309(a) are demonstrably overbroad. For example, the Government asserts "an illegitimate child typically remains in the custody of the mother." Resp. Br. at 25. Since 1970, however, the number of single-parent families headed by males in the United States (3.2 million in 1995) has grown far more rapidly than female-headed families. United States Department of Health and Human Services, 24 *Children Today* 1 (1997). For millions of male-headed single parent families, the Government's assertion that "enforcement to financial obligations [against mothers] is not a significant issue," Resp. Br. at 25, is simply false. Indeed, the domestic child support law cited by the Government in support of its position that fathers alone may be permissibly targeted for such enforcement is gender-neutral, not gender-specific, and thus provides no justification for the gender-based regime that the Government now defends. See, *e.g.*, *Blessing v. Freestone*, 117 S.Ct. 1353 (1997).

The Government also cites as "typical" the example of an American man briefly overseas on temporary military duty, who sires a child out-of-wedlock with an alien woman. Resp. Br. at 29 n. 16. The implication of the

Government's argument is that generalizations based on this "typical" scenario constitute a valid basis for according rights and benefits to citizens and their out-of-wedlock children, and for concluding that affected men and women citizens are not "similarly situated." Again, the Government's assumptions are sadly out of date. While at the time Section 309 was adopted, women made up only a tiny fraction of the military, by 1996, women constituted 13.3 percent of all active-duty U.S. military personnel. *More Fighters in the Force are Women*, U.S.A. Today, March 11, 1997, 5A. Indeed, these numbers are growing: 20 percent of the recruits who enter military service are women. James Brooke, *New Attention to Women in Military*, New York Times, March 3, 1997, A10. Further, women, like military men, are frequently stationed abroad. Olympia Snowe, *Alongside Men*, The Washington Post, May 17, 1997, A23. Indeed most United States citizens residing abroad – civilian and armed forces combined – are female. United States Department of Commerce, Bureau of Census, Population Paper Listing 57, Appendix B (1997).

In an astonishing argument that could, if given credence, be used to justify a wide range of discriminatory practices both abroad and domestically, the Government next argues that concerns about "statelessness" arising from the sex-specific citizenship laws of other countries requires children of U.S. citizen mothers be treated more solicitously than children of citizen fathers. Resp. Br. at 33-34. However, the problem of statelessness certainly does not provide an important or even rational basis for across-the-board gender based discriminatory treatment of citizens and their children.

The government could easily address the potential problem of statelessness in a non-discriminatory manner. As noted, *supra*, that potential problem supports remedial expansion. It does not justify discrimination. The Government should do what the Court has repeatedly told it to do, treat people as individuals rather than identify them according to gender based, outdated stereotyping. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

Finally, it is quite clear the Government lacks not only a factual justification for the stereotyping in this case, but also can cite no case law that would justify the stereotyping. Its citation of *Schlesinger v. Baird*, 419 U.S. 498 (1975), Resp. Br. at 29, distorts that case (which rested on the regulations creating different career paths for women and men in the military) beyond recognition. Decided in the early days of gender-based equal protection clause jurisprudence, *Schlesinger* applied only a rational basis review to uphold sex-based distinctions. While the Government selectively cites *Lehr v. Robertson*, 463 U.S. 248 (1982), in support of differential treatment of unmarried fathers, it ignores the Court's unequivocal statements that "these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated, with regard to their relationship with the child." *Id.* at 267. In this case a child whose citizen mother had established ties identical to those of Mr. Miller, would easily meet the gender-specific requirements of Section 309(a). But because Ms. Miller's citizen parent was male, she cannot meet the requirements. Gender alone is the deciding factor in determining Ms. Miller's eligibility under Section 1409. This scheme

violates the Equal Protection requirements of the Due Process Clause.

CONCLUSION

The Petitioner respectfully requests the Court to reverse, in part, the judgment below and declare the statute in question unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PEÑERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE OF THE UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1060

LORELYN PEÑERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE OF THE UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been lodged with the Clerk.

equality embodied in the Constitution and this Nation's civil rights laws. Through its Women's Rights Project, the ACLU has battled for more than twenty-five years against the legal perpetuation of outmoded gender stereotypes. Through its Immigrants' Rights Project, the ACLU has fought against discriminatory immigration policies. Because this case challenges a statute that facially discriminates on the basis of gender in the naturalization context, it raises issues of vital importance to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

NOW Legal Defense and Education Fund ("NOW LDEF") is one of the Nation's foremost nonprofit advocacy organizations dedicated to fighting sex discrimination through litigation, advocacy and public education. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, and has frequently appeared before this Court both as *amicus curiae* and direct counsel. A major goal of NOW LDEF is the elimination of sex-based generalizations and stereotypes, particularly those that concern the family roles of men and women.

STATEMENT OF THE CASE

Petitioner Lorelyn Miller was born in Angeles City, Republic of the Philippines, on June 20, 1970. Her mother is Luz Peñero, a Filipino national. Her father is Charlie R. Miller, an American citizen. Ms. Miller's parents were not married at the time of her birth and never subsequently married. Her birth certificate identifies Luz Peñero as her mother, but it does not list her father. No question exists concerning her paternity, however, because in July of 1992, shortly after her twenty-second birthday, a Texas court entered a Voluntary Paternity Decree establishing that Charlie R. Miller is indeed Ms. Miller's biological father.

Ms. Miller filed an application for registration and documentation with the U.S. State Department in November of 1991. The Department initially denied the application in February of 1992, and upheld the denial on further review in

November of 1992. The application was denied on the ground that Ms. Miller failed to meet the requirements of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1401 *et seq.*, which provides in Section 1409(a) that a foreign-born child with an American father and an alien mother will be deemed a U.S. citizen as of the date of birth if:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1994).[2] None of these requirements would have applied to Ms. Miller if her *mother* had been a U.S. citizen and her *father* an alien. In this situation, Ms. Miller would have automatically become a U.S. citizen at birth, provided her mother had been physically present in the United States or one of its possessions for a continuous period of one year. 8 U.S.C. § 1409(c).

Ms. Miller therefore filed suit in U.S. District Court, contending that Section 1409(a) violated the equal protection component of the Fifth Amendment's Due Process Clause. The District Court dismissed the suit on the ground that Ms.

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[2] Because she fell within a narrow statutory age bracket, Ms. Miller could have satisfied the requirement of Section 1409(a)(4) on a showing that she was legitimated prior to age 21, rather than 18, as provided under the section before it was amended in 1986. *See* 8 U.S.C. § 1409 *note* (1986 Amendments).

Miller lacked standing to challenge the statute. *Miller* v. *Christopher*, 870 F. Supp. 1 (D.D.C. 1994). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit held that the District Court erred in finding that Ms. Miller lacked standing. However, relying on this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), the Court of Appeals rejected her equal protection challenge on the ground that this Court's equal protection standards do not apply to Congress' exercise of its immigration powers. Instead, the Court of Appeals held that the gender-based immigration requirements need only be "facially legitimate" and here they are because "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13. This Court thereafter granted certiorari.

SUMMARY OF ARGUMENT

In *United States* v. *Virginia*, 116 S. Ct. 2264 (1996) ("*VMI*"), this Court reaffirmed in the strongest possible terms that "all gender-based classifications today" by every governmental unit must be subjected to "heightened scrutiny" under the Equal Protection Clause. The Court also reaffirmed that such classifications can pass muster under that scrutiny only if the government affirmatively advances an "exceedingly persuasive justification" for the classification. 116 S. Ct. at 2274-75, 2286.

This case involves the very kind of gender discrimination *VMI* was designed to eradicate: treating men and women differently based on overbroad, outdated stereotypes—here, the stereotype that women, but not men, have a natural connection to their children. Using that stereotype Congress passed a law automatically granting citizenship to illegitimate children of U.S. citizen mothers, but denying it to children of U.S. citizen fathers, unless the father first proves he is indeed the father and documents his commitment to care for the child. Such a statute should have been held to be a violation of equal protection under *VMI* given that the government has not and could not advance an "exceedingly persuasive justification" for it.

The statute was not invalidated, however, because the Court of Appeals thought that heightened scrutiny could not be applied to this gender stereotyping *at all* under this Court's 1977 decision in *Fiallo* v. *Bell*, *supra*. Under *Fiallo*, the court thought, equal protection challenges to an exercise of the sovereign immigration power could only be reviewed for facial legitimacy. And it found it was indeed legitimate because the court endorsed the antiquated sex stereotypes, saying: "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13.

For two reasons *Fiallo* does not control this case. First, this Court's jurisprudence since *Fiallo* makes clear that the government cannot avoid heightened scrutiny for acts of invidious discrimination merely because it is exercising fundamental sovereign powers affecting national security.

Second, even if there is something special about the *immigration* power over aliens that minimizes equal protection review, this case does not concern immigration. Instead, it concerns citizenship. The Court has never held that congressional action conferring citizenship is subject to anything less than the full protections of the Due Process and Equal Protection Clauses. Nor should it.

Finally, even if heightened scrutiny does not apply here and the stereotyping at issue need be nothing more than "facially legitimate," the stereotyping in this case is so gross and so completely without justification that it cannot be sustained even under that lesser test.

The proposition that women but not men care for children is an outdated relic. So too is the proposition that in certain areas Congress may engage in offensive stereotyping without being subject to the requirements of the Due Process or Equal Protection Clauses. The Court should put both relics to rest in this case.

ARGUMENT

I. SECTION 1409(a) IS PREMISED ON OVERBROAD AND OUTDATED GENDER STEREOTYPING

It is now beyond dispute that "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). Much of the justification for the sex discrimination that pervades the history of our Nation and its laws came from gender stereotyping, *i.e.*, assumptions about the proper roles, the proper spheres, the proper natures, of women and men. Such stereotyping was reflected in Justice Bradley's now infamous statement in his concurrence upholding Illinois' refusal to admit a woman to the practice of law: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

This brand of invidious categorization of people based on their gender has been thoroughly and repeatedly condemned by this Court. Yet it has risen again in the statute at issue, and it has been given new life by the decision of the Court of Appeals. The statute assumes that mothers, but not fathers, have a natural connection to their children; based on that assumption, it requires proof from fathers, but not mothers, of commitment and concern for their children before a father's child, but not a mother's, can become a citizen. The justification for the statute, offered by the Court of Appeals, could have been written by Justice Bradley himself: "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13.

Inevitably, stereotypes often have some basis in fact. However, even a true generalization based on gender is suspect when it becomes a basis for apportioning legal benefits. *See, e.g.*, *Weinberger* v. *Weisenfeld*, 420 U.S. 636,

645 (1975) ("Obviously, while the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support * * * such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."). Instead, "fairness to individuals" dictates that such a generalization is "an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Los Angeles Dep't. of Water & Power* v. *Manhart*, 435 U.S. 702, 708-09 (1978) (construing Title VII of the Civil Rights Act of 1964).

The gender-based stereotype that underpins Section 1409(a) is not only suspect on its face—as just another version of Justice Bradley's discredited notion of separate spheres for men and women—but, as set out below, it is also untrue, as more and more men and women move beyond old norms of parenting and familial roles.

A. The Available Studies Show That Parenting Success Is Not A Function of Gender

It is now well-established that the gender of a parent does not determine whether that parent will have a close personal relationship with his or her children. *See* Graeme Russell & Norma Radin, *Increased Paternal Participation: The Father's Perspective*, in *Fatherhood and Family Policy* 156 (Michael E. Lamb & Abraham Sagi eds., 1983) (contrary to stereotype, studies show that fathers can be "just as sensitive and competent in care-giving as mothers"); William Marsiglio, *Fatherhood, Contemporary Theory, Research and Social Policy* 7 (William Marsiglio ed., 1995) (studies show that "although fathers typically interact with their children differently than do mothers, men are not inherently deficient in their ability to parent"); *see also* Pamela Daniels & Kathy Weingarten, *The Fatherhood Click: The Timing of Parenthood in Men's Lives*, in *Fatherhood Today: Men's Changing Role in the Family* 41 (Phyllis Bronstein & Carolyn Cowen eds., 1988) ("Fatherhood Today") (the ability

and desire to nurture a child is not inherent in either sex, but it must be learned and developed by both).

Indeed, the gender stereotype on which this statute is premised—that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day child rearing duties—is plainly not valid today, even if it once was. *See* Rosalind C. Barnett & Grace K. Baruch, *Correlates of Fathers' Participation in Family Work*, in *Fatherhood Today* 66-67 (fathers are no longer confined to the role of providing financial support but rather are active participants in the socialization of the child).

In addition, gender stereotypes based on the notion of woman's role as the ideal mother connected by natural law to her children are clearly outdated and can lead to serious harms for women who deviate even slightly from this stereotype. In fact, the notion that the female parent, but not the male parent, has a natural and primary function of caring for the children and the home, so that no further proof of her connection to her children is necessary, is a thinly disguised version of the idea that woman's place is in the home and man's is in the marketplace. This dichotomy has been consistently harmful to women because it provides justification for gender-based classifications that limit women's opportunities and deny protection to their dependents. For example, women were barred from tending bar in Illinois because this conflicted with the legislature's notion of woman's place. *Goesaert* v. *Cleary*, 335 U.S. 464, 467 (1948). Similarly, women's dependents were given less protection in insurance systems like social security than were men's dependents based on the assumption that most women stayed home and cared for their children while most men worked outside the home. *See Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger*, *supra*; *Fronteiro*, *supra*.

The last three decades have seen women move beyond this stereotype from the role of the stay-home mother to that of working woman. The numbers tell the story. In 1960, 35.5% of the civilian employed population were women. In 1995, that percentage increased to 55.6. In 1960, approximately

39% of married women with children under 18 worked. In 1995, that figure was approximately 76%. Economics and Statistics Admin., Statistical Abstract of the United States 394, 400, U.S. Dept. of Commerce (1996). As a direct result of this movement of women into the workforce, fathers have become more active participants in childcare for reasons of both choice and necessity.

But women's re-entry into the work force is not, by any means, the only reason that fathers have assumed a greater share of domestic responsibilities. "[A]part from any response to the women's movement, men are also seeking increased emotional closeness with their infants as part of a men's movement toward fuller personhood, and as a reaction against the alienation and burnout of the purely instrumental role of family provider." Michael W. Yogman, James Cooley, and Daniel Kindlon, *Fathers, Infants, and Toddlers*, in *Fatherhood Today* 53. And contrary to any supposition that single-custodial fathers would be deficient in their ability to provide the emotional support once imputed solely to mothers, studies show that in fact fathers are able to provide children both emotional support and psychological nurturance. *See generally* Shirley M.H. Hanson, *Divorced Fathers with Custody*, in *Fatherhood Today* 166-194.

This established role of men as caring parents has not gone unnoticed in the popular culture. "Now the joys of fatherhood and shared parenting are touted in commercials, television programs, books, and magazine articles." *Id.* And, "[b]y the 1980s there were more fathers than mothers in television commercials, with more men than ever shown cuddling babies and pushing strollers." Scott Coltrane, *The Future of Fatherhood, Social, Demographic, and Economic Influences on Men's Family Involvement*, in *Fatherhood: Contemporary Theory, Research, and Social Policy* 255-256 (1995).

Indeed, it is now increasingly common that fathers, like mothers, stay home when their infant is sick, or go to a teacher conference, or take their 12-year-old to the orthodontist. *See* Phyllis Bronstein, *Marital and Parenting*

Roles in Transition: An Overview, in *Fatherhood Today* 3-4; *see also* Nancy K. S. Hochman, *Fathers Play Larger Roles in Custody*, N.Y. Times, April 20, 1997, Section 13LI, at 1 (more fathers are seeking shared time with their children and are engaged in joint decisionmaking on issues like religious affiliation, education and health concerns).

None of this is to say that men as a group are always exactly equal to women as a group in the quantity and quality of their parenting. Rather, it is to say that gender simply does not indicate whether a person will be a devoted parent. As this Court has repeatedly held, the issue is one in which people should be treated as *individuals*, not classified based on outdated, overbroad, gender stereotyping.

B. The Courts Have Confirmed that Gender Should Not Be Determinative of Parenting Performance

It is not only sociological data that belie the stereotype in this statute. The unfounded propositions that fathers are inherently less competent as parents and women are caregivers by nature has also been rejected by this Court and continues to be resoundingly rejected by courts and judicial task forces across the country.

For example, in *Califano* v. *Westcott*, this Court invalidated a statute that provided benefits to families whose dependent children were deprived of parental support because of the unemployment of the father, but denied such benefits if the mother became unemployed. It did so because a law "that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life" is part of the "baggage of sexual stereotypes." 443 U.S. 76, 89 (1979) (citation and internal quotation marks omitted). Similarly, in striking down a statute that automatically granted social security benefits to surviving widows with children but denied those benefits to the widower of a women who died in childbirth, making it difficult for him to stay at home with their surviving infant, this Court said: "It is no less important for a child to be cared

for by its sole surviving parent when that parent is male rather than female." *Weinberger*, 420 U.S. at 652.

In fact, for more than twenty-five years this Court has rejected statutes based on the very stereotype found in Section 1409 and upheld here by the Court of Appeals. *See, e.g.*, *Caban* v. *Mohammed*, 441 U.S. 380, 394 (1979) (striking statute which gave unwed mothers, but not unwed fathers, the power to unilaterally block an adoption, and criticizing the assumption that fathers are "invariably less qualified and entitled than mothers to exercise concerned judgment as to the fate of their children"); *Orr* v. *Orr*, 440 U.S. 268 (1979) (invalidating law that authorized state courts to impose alimony obligations only on men); *Reed* v. *Reed*, 404 U.S. 71 (1971) (invalidating statute that required males to be preferred to females as administrators of an estate and criticizing the assumption that men are more familiar with the business world).

Judicial task forces have likewise recognized that the stereotype on which Section 1409 is based—the image of the mother as connected by nature to her children while fathers are not—is harmful to both mothers and fathers in many areas, particularly in custody determinations. Paradoxically, the stereotype of women as natural caregivers of children can harm women seeking custody of their children in a divorce situation when those women do not conform to a judge's notion of the natural mother. Thus, women who do demanding work outside the home or who have an active social life may be disadvantaged in seeking custody where a man who did the same things would not be. For example, according to reports from Gender Bias Task Forces around the country, "stereotypes about 'fit mothers' subject women to heightened moral scrutiny in regard to parenting and personal behavior." Lynn Hecht Schafran, *Gender Bias in Family Courts*, 17 Family Advocate 22, 22-28 (1994). Similarly, stereotypes of women as the primary caregivers cause concern for the courts when a father seeks custody. In such cases, "mothers are held to a different and higher standard of parenting and personal behavior than fathers."

Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 Fla. L. Rev. 181, 192 (1990). For that reason, fathers are extremely successful when they contest custody. *See* The Report of the Gender Bias Study of the Massachusetts Supreme Judicial Court (1989) (finding that fathers who actively contest custody of the mother win in 70 percent of the cases).

At the same time women must struggle to overcome stereotypes associated with the "ideal mother," however, the honest desire of many fathers to assert their natural connection to their children belies the stereotype of the abandoning, illegitimate father. Today, "[t]here's no question that more fathers are asserting their rights to participate in their children's lives." Harriet Chiang, "Expanded Roles, Expanded Rights," *The San Francisco Chronicle*, August 23, 1995, at A1. Indeed, recent casebooks are full of decisions in which illegitimate fathers have turned to the courts for partial and full custodial rights with respect to their children, contradicting the notion that illegitimate fathers do not care for their children. *See, e.g., C.L.C.* v. *J.D.A.*, 690 So. 2d 365 (Ala. Civ. App. 1996) (father sought and was awarded custody, care, and control of child born out of wedlock), *cert. denied*, No. 1951715 (Ala. Mar. 21, 1997); *Bonilla* v. *Narvaez*, 642 N.Y.S. 2d 257 (N.Y. App. Div. 1996) (father of child born out of wedlock filed paternity petition and custody petition).

Again, these cases do not prove—and are not cited to show—that all illegitimate fathers have connections to their children. However, what all these data and cases make clear is that the stereotyping that underlies the statutory provision at issue here is false and grossly unfair and that the stereotyping is harmful to both men and women. The truth is that a person's gender does not dictate the level or quality of parental care or commitment. As next shown, this fact renders Section 1409(a) unacceptable under this Court's jurisprudence.

II. SECTION 1409(a) IS UNCONSTITUTIONAL UNDER ANY LEVEL OF SCRUTINY

Notwithstanding the blatant gender stereotyping imposed by Section 1409(a), the Court of Appeals failed to assess the provision's constitutionality under the equal protection component of the Fifth Amendment's Due Process Clause.[3] Instead, relying on this Court's opinion in *Fiallo*, the Court of Appeals held that even if the statute was "based on an overbroad and outdated stereotype," that fact "should be addressed to the Congress rather than the courts." Pet. App. 13 (quoting *Fiallo*, 430 U.S. at 799 n.9). Moreover, as already noted, even though the Court of Appeals recognized that under *Fiallo* the statute is at the very least subject to review for "facial legitimacy," the court held it legitimate by relying on the *very stereotype* underlying the statute itself: "A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." *Id.*

For three reasons, it is submitted that the Court of Appeals erred. First, this Court's cases since *Fiallo* make clear that even when Congress exercises the kind of sovereign power presented here, that exercise must be consistent with Due Process and Equal Protection and must be subjected to heightened scrutiny to check racial and gender stereotyping. Second, unlike *Fiallo* this case concerns a citizenship statute, and is thus plainly subject to the full protections of the Due Process and Equal Protection Clauses. And third, even if this case were controlled by *Fiallo*'s minimal "facial legitimacy" standard rather than heightened scrutiny, the blatant stereotyping in the statute does not meet that lesser standard.

A. *Fiallo* Has Been Superseded

This Court's jurisprudence has changed since *Fiallo* was decided. Last Term in its *VMI* decision, the Court summar-

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[3] The requirements of the Fourteenth Amendment's Equal Protection Clause apply to the federal government through the Fifth Amendment's Due Process Clause. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

ized as follows "the core instruction" of its "pathmarking decisions" in *J.E.B.* v. *Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) and *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982): "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *VMI*, 116 S. Ct. at 2274. Both *VMI* and the "pathmarking decisions" it cited were handed down after *Fiallo*. And these cases make clear that the heightened scrutiny standard those cases described was made applicable without exception to *all* "gender-based government action." Indeed, the 1994 *JEB* decision could hardly have been more categorical: "[the] long and unfortunate history of sex discrimination" in this country "warrants the heightened scrutiny we afford *all* gender-based classifications today." 511 U.S. at 136 (emphasis supplied).

Nevertheless, the Court of Appeals read this Court's 1977 decision in *Fiallo* as precluding the application of heightened scrutiny to the obvious gender-based discrimination presented by the government action here. Indeed, that court thought that heightened scrutiny did not apply here at all. *Amici* respectfully disagree with that conclusion. In our view, a proper application of *VMI* mandates that the gender classification contained in this statute must be subject to heightened scrutiny, which it cannot survive.

This Court long ago made clear that despite its obligation to defer to Congress' judgment in certain areas, it is nonetheless duty bound to review those judgments when they are challenged as violative of the Constitution. "When it appears that an Act of Congress conflicts with [a constitutional] provision[ ], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop* v. *Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that a statute which stripped military personnel of American citizenship was unconstitutional).

Further, as already noted, however relaxed and selective this Court's approach to gender-based discrimination may

have been in 1977, after *Mississippi Univ. for Women*, *JEB* and *VMI* there can be no doubt that the Constitution does not tolerate such discrimination by *any* governmental unit under *any* circumstances, unless the government shows the requisite "exceedingly persuasive justification."

Moreover, whatever may have been the case in 1977 when *Fiallo* was decided, in *Landon* v. *Plasencia*, 459 U.S. 21 (1982) (decided the same year as *Mississippi Univ. for Women*) the Court put to rest any idea that the Due Process Clause is necessarily inapplicable to aliens seeking admission to this country. *Landon* made clear that even when the issue addressed by Congress is immigration of aliens, the Court must still make a judgment whether the alien seeking admission has shown sufficiently close ties to the country that her Due Process rights are triggered. In *Landon*, those ties were triggered by the fact that the alien was a lawful permanent resident. Here, those ties are established by the fact that petitioner is the child of a U.S. citizen, and by the further fact (as the Court of Appeals found) that she has an "ongoing parental relationship" with him. Pet. App. 13.

Finally, in insisting that heightened scrutiny did not apply to this exercise of Congress' important sovereign power over immigration, the Court of Appeals completely overlooked this Court's post-*Fiallo* decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). There this Court made clear that even though enormous deference is due to Congress' exercise of its sovereign power over national security and foreign affairs, such deference does *not* require complete abdication to Congress and it certainly does not trump the heightened scrutiny standards of the Equal Protection Clause.

In *Rostker*, the Court considered a challenge to a congressional statute requiring only men to register for the draft. A group of male plaintiffs sued, arguing that the statute violated equal protection under the Due Process Clause of the Fifth Amendment. In reviewing that argument, the Court first stressed that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded

Congress greater deference." *Id.* at 64-65. This, of course, is almost identical to the deferential description the Court in *Fiallo* gave to Congress' immigration power: "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792 (internal quotation marks and citations omitted).

This parallelism reflects the fact that the immigration and war powers are both fundamental attributes of national sovereignty. The exercise of either power by Congress has traditionally been afforded deference by the courts.[4] However, the exercise of neither power is sufficient to sweep away the rest of the Constitution. To the contrary, as *Rostker* explained, even though deference may be due because of the "context" of the "congressional choice," still:

> Congress is [not] free to disregard the Constitution when it acts in the area of military affairs. In that area, *as any other*, Congress remains subject to the limitations of the Due Process Clause * * * .

453 U.S. at 67 (emphasis added and internal citations omitted).

Significantly, though conceding that the Constitution's equal protection requirements applied in *Rostker*, the Solicitor General argued that rational review rather than the standard heightened scrutiny test should govern the gender-based distinctions there at issue. *See id.* at 69. But the Court *expressly rejected* this invitation: "We do not think that the substantive guarantee of due process or certainty in the law

[4] It is questionable, at best, whether the exercise of immigration powers should be afforded as much deference as the exercise of war powers. The assumption of equal deference ultimately rests on the xenophobic observation, most famously articulated in the discredited *Chinese Exclusion Case*, that our national security is threatened by "vast hordes of [a foreign] people crowding in upon us." 130 U.S. 581, 606 (1889). *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 Harv. L. Rev. 853, 862 (1987) (describing the *Chinese Exclusion* case as a "constitutional fossil").

will be advanced by any further 'refinement' in the applicable tests as suggested by the Government." *Id.* at 69.

Having refused to depart from traditional equal protection analysis, the Court analyzed the statute using intermediate scrutiny, while at the same time giving due deference to Congress' policy choices. In other words, quite unlike the reading the Court of Appeals gave to *Fiallo*, *Rostker* made plain that judicial deference to national sovereignty decisions does *not* obviate the need to apply heightened scrutiny to gender-based decision-making. Rather, deference requires a court to pay special respect to Congress' specialized judgments concerning the security matters at issue, but nevertheless to insist that those judgments are supported by evidence and meet the heightened scrutiny standards if they discriminate on the basis of gender. *Id.* at 69-72.

Applying that approach, the Court in *Rostker* found that the government had met its heightened burden by showing through "extensive testimony and evidence" that, quite unlike the "gender-based discrimination cases" where governments had acted "reflexively and not for any considered reason," in the case of the draft Congress had acted "realistically" on the basis of extensive information that "the sexes are not similarly situated." *Id.* at 72, 79.

This, of course, is not the approach taken by the Court of Appeals here. And, obviously, quite unlike the situation presented in *Rostker*, here there is no indication whatever that Congress *even addressed* the issue of gender discrimination, much less produced exceedingly persuasive evidence to justify it.

The Court of Appeals did not cite *Rostker*. Neither did it cite *Landon*, or *JEB*, or *Mississippi Univ. for Women*, or *VMI*. Instead, it simply relied on *Fiallo* for the proposition that immigration actions are immune from heightened scrutiny, no matter how blatant the gender-based stereotyping contained in that action. This Court should not condone this analysis, any more than it would have condoned it if the statute had said that children of black parents, but not of

white parents, must show that those parents were financially prepared to support them. It is unthinkable that such a statute would not have been subjected to heightened scrutiny. The same should be true here.[5] As Professor Aleinikoff has said:

> [Immigration law] is an ordinary, if powerful, constitutionally delegated prerogative. Accordingly, immigration regulations ought to be subject to the judicial scrutiny accorded other exercises of federal power * * *. There is no reason that immigration law cannot thrive within the constitutional boundaries established for other delegated and implied federal powers * * *. [I]mmigration law must be brought into the fold of modern constitutional law.

T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 866, 871 (1989).

For all these reasons, and contrary to the Court of Appeals' view, *Fiallo* does not control this case. This Court's jurisprudence today does not exempt the immigration power from the heightened scrutiny requirements of the Equal Protection Clause.

B. *Fiallo* Is In Any Case Distinguishable

As shown, exercises of the immigration power should not be *per se* exempt from heightened scrutiny. However, even if *Fiallo* required that they be exempt in some circumstances, *Fiallo* would not be controlling here because this case concerns not immigration but conferral of *citizenship*. This Court has never exempted citizenship determinations from ordinary equal protection analysis, much less said that heightened scrutiny would not apply if such determinations were based on race or gender stereotypes. Accordingly, even if some immigration policies remain beyond the reach of

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[5] As noted above, the proper disposition of this case does not depend on overruling *Fiallo*, which can be distinguished. However, to the extent that *Fiallo* was "badly reasoned" at the outset and no longer reflects this Court's constitutional jurisprudence, it should be overruled. *See Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991).

VMI, the Court should not allow citizenship to escape the requirements of that decision as well.

As the United States Court of Appeals for the Ninth Circuit has explained, citizenship statutes are fundamentally different from immigration statutes. *See Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1414 (9th Cir. 1993) ("Unlike the governmental decisions at issue in *Fiallo* and [*Kleindienst* v.*] Mandel*, [408 U.S. 753 (1972)] Section 1993 [conferring United States citizenship on foreign-born offspring of United States citizen fathers, but not mothers] represents not a congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance. This type of decision strikes us as *fundamentally different* from one considering individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it") (emphasis supplied).

Congress' citizenship decisions are "fundamentally different" from its immigration decisions because when regulating immigration, Congress exercises its authority to exclude persons with *no* present claim to citizenship. However, laws concerning citizenship apply to individuals who have an established connection to the United States, be it through time spent on American soil, military service, or family relationship to an American citizen. It is this tie to the United States that cloaks an individual with a claim to some degree of constitutional protection. *See, e.g., Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society").

Here, Congress has recognized that birth to an American citizen is a sufficiently strong tie to this country to make a child eligible for citizenship based on that tie alone. Because petitioner Miller has a congressionally recognized significant tie to this country—which would entitle her to all of citizenship's protections were it not for the type of gender-based

classification that this Court has repeatedly held unconstitutional in other contexts—she should be eligible to invoke the protections of the Constitution, including heightened scrutiny of the gender stereotype contained in the statute.

For these reasons, the Court of Appeals was wrong to follow *Fiallo*. And it was also wrong, therefore, to suppose that traditional Due Process/Equal Protection standards do not apply here.

C. The Statute Cannot Survive Heightened Scrutiny

Once it becomes clear that *Fiallo* does not control and that the requisite heightened scrutiny must be applied to this statute, it plainly cannot survive, even giving due deference to Congress' policy judgments.

As noted, in *VMI* this Court set forth the applicable framework for analyzing a gender-based equal protection challenge. The government must demonstrate an "exceedingly persuasive justification" in order to defend gender-based government action. 116 S. Ct. at 2274. Specifically, the government must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724) (internal quotation marks and citation omitted). However, "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi Univ. for Women*, 458 U.S. at 725 (citing *Frontiero*, 411 U.S. at 684-685). Similarly, the government's justification for the classification may not be based on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 116 S. Ct. at 2275.

Section 1409(a) provides that in order to obtain U.S. citizenship, an illegitimate child of a U.S. citizen father must prove both (1) a biological relationship with the father by clear and convincing evidence and (2) the existence, prior to

the child's eighteenth birthday, of a close personal relationship between them, as evidenced by the father's written agreement to provide the child with financial support until the child reaches age eighteen, and the father's voluntary acknowledgment of his paternity or a court adjudication confirming paternity. No such requirements must be met if the mother is the U.S. citizen.

The asserted important governmental objective for requiring that fathers, but not mothers, prove a biological connection by clear and convincing evidence under Section 1409 is to reduce fraudulent claims of citizenship. The asserted important governmental objective for requiring fathers, but not mothers, to prove a close personal relationship is to promote early ties to the United States and to relatives who are U.S. citizens. Pet. App. 13. *Amici* do not dispute that these are important objectives and acknowledge that deference is due them. But *amici* emphatically deny that the government's reliance on gender is substantially related to the achievement of those objectives. It is here that this statute plainly runs afoul of equal protection guarantees.

The Court of Appeals attempted to defend requiring fathers but not mothers to prove a biological connection by clear and convincing evidence under Section 1409 by referring to "the difficulties that once plagued the proof of paternity." Pet. App. 12. But as Judge Wald pointed out in her separate opinion, whatever justification there once may have been for distinguishing between men and women on this ground is now gone. Pet. App. 19. Indeed, as she noted, Congress itself has acknowledged that DNA testing has long since removed the claim that a father's biological connection is always inherently in doubt, while a mother's is not. As Congress has explained, "[r]ecent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent" of false paternity claims. Pet. App. 19 (Wald, J., concurring) (quoting H.R. Rep. No. 527, 98th Cong., 1st Sess. 38 (1983)). Thus, while the uncertainty of paternity may once have justified requiring fathers but not mothers to prove a blood relationship by clear and

convincing evidence, today it does not. Moreover, there is absolutely no basis for assuming that men are more likely than women to file fraudulent claims.

The statute's other gender-based distinction requires men but not women to demonstrate a commitment to the child (through legitimation and a financial pledge). Obviously, this cannot be substantially related to the purpose of granting citizenship only where there is a close tie with the child, unless it is assumed that mothers but not fathers will have such a tie. As noted, this Court requires an "exceedingly persuasive justification" for such an assumption. *VMI*, 116 S. Ct. at 2274. Yet here, neither the Congress nor the government produced any such justification. Nor could it. For as we have shown, the assumption is completely unfounded.

In sum, Section 1409(a)'s gender-based distinctions are not substantially related to achievement of its objective. Accordingly, just as the Court has done in numerous other cases of comparable stereotyping, the statute should be invalidated.[6]

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[6] *See, e.g., VMI, supra* (only men permitted to attend the Virginia Military Institute); *Mississippi Univ. for Women, supra* (only women permitted to attend state nursing school); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr, supra* (only men could be ordered to pay alimony following divorce); *Craig* v. *Boren*, 429 U.S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (women reached majority at an earlier age than did men); *Weinberger, supra* (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero, supra* (determination of spouse's dependency based upon gender of member of Armed Forces claiming dependency benefits); *Reed, supra* (statute preferred men to women as administrators of estates).

D. The Statute Cannot Meet Even The *Fiallo* "Facially Legitimate" Test

Even if this Court holds that "heightened" scrutiny is not applicable, Section 1409(a) nevertheless violates the Constitution. For the requirement that fathers, but not mothers, prove a biological connection, legitimate the child by age 18, and agree to provide financial support until the child reaches majority in order for that child to become a citizen, is not permissible even under the *Fiallo* test.

In *Fiallo*, the Court held that there is "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens * * * ." 430 U.S. at 793 n.5. This judicial responsibility, the Court said, is to uphold Congress' action only when there is "a facially legitimate" reason for it. *Id.* at 793-794. The reasons offered for Section 1409(a) do not satisfy this standard.

As noted, the reason offered for requiring that only fathers prove a biological relationship by clear and convincing evidence is the reduction of fraudulent claims. But as also noted, Congress has acknowledged that DNA testing has removed all doubt about the establishment of paternity. *See also Clark* v. *Jeter*, 486 U.S. 456, 465 (1988) (explaining that genetic testing techniques can now conclusively disprove over ninety-nine percent of false paternity claims). Because both mothers and fathers are easily able to prove a biological relationship, there is no facially legitimate reason for placing different burdens on fathers and mothers.

The reason offered for requiring only fathers to prove a close personal relationship—ensuring close family ties and personal commitment to the child—is likewise not facially legitimate. Rather, as shown, the presumption that mothers have close ties to their children and fathers do not is completely antiquated and demonstrably false.[7] Such blatant

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[7] Ironically, the ineffectiveness with which section 1409(a) regulates the existence of close family ties is demonstrated by the fact that the father in this case *did* have a close relationship with

stereotyping was repeatedly condemned by this Court *even before* heightened scrutiny was adopted.[8] It should be condemned again here no matter what standard the Court applies to it.

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his daughter, Pet. App. 13, yet she was denied citizenship under the statute. Similarly, in *Fiallo*, Justice Marshall noted in dissent that the father in that case had acknowledged paternity and had registered as the child's father soon after birth. 430 U.S. at 804. Even though this father took care of the child since birth, and notwithstanding that the mother abandoned the child and married another man, the father's petition to classify his son as his "child" for purposes of obtaining an immigration visa was denied. *See id.*

[8] For example, this Court held that a statute which extended the age of majority for boys three years beyond that for girls was unconstitutional under even the most deferential standard of review. *See Stanton, supra* (holding that there was "nothing rational in the distinction" between males and females); *see also Weinberger, supra* (holding that a statute granting survivor benefits to a widow with dependent children but not to a widower with dependent children is "entirely irrational"); *Reed, supra* (holding that a statute which gives preference to men when determining which of several equally qualified persons should serve as administrator of an estate is an "arbitrary legislative choice").

CONCLUSION

For the foregoing reasons, the Court should declare the statute unconstitutional and reverse the judgment below.

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